Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

GARY L. KRETCHMAR,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

On Petition For A Writ of Certiorari
To the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

Gary L. Kretchmar, AS-2147
In Propria Persona
SCI-Graterford
P.O. Box 244
Graterford, PA 19426-0244

Dated: November 10, 2004

QUESTIONS PRESENTED FOR REVIEW

1. If new reliable evidence that was not presented at trial, does not qualify for relief pursuant to one of the enumerated exceptions under 42 Pa. C.S.A. Sec.9545 (b) (1) (ii), then is the new reliable evidence "newly presented" pursuant to Schlup v. Delo, 115 S. Ct. 851, 865 (1995)?

2. Has the Commonwealth of Pennsylvania left open a state avenue to process a **BRADY** violation claim that may be procedurally barred because it could not be raised within one year of the date of conviction?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the Office of the District Attorney for Bucks County, Pennsylvania and the Office of the Attorney General for the Commonwealth of Pennsylvania.

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Petition for Rehearing, Court of Common Pleas of Bucks County, Criminal Division, No. 87-1190-1, October 15, 2002

Opinion Pursuant to Pa. Rule of Appellate Procedure 1925, Court of Common Please of Bucks County, Criminal Division, No. 87-1190-1, October 30, 2002.

Appeal from October 1, 2002 Order, Superior Court of Pennsylvania. No. 3346 EDA 2002, June 5, 2003

Application for Re-argument, Superior Court of Pennsylvania, No. 3346 EDA 2002, July 31, 2003

Petition for Allowance of Appeal, Supreme Court of Pennsylvania, No. 589 MAL 2003, February 17, 2004

Petition for Writ of Habeas Corpus pursuant to 42 Pa. C.S.A. §721, Supreme Court of Pennsylvania, No. 84 MM 2004, August 16, 2004

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C §1257 (a). The Supreme Court of Pennsylvania denied petitioner's Petition for Writ of Habeas Corpus on August 16, 2004, and this petition is timely filed within 90 days thereafter.

ORDER SOUGHT TO BE REVIEWED

In a Per Curiam Opinion, at No. 84 MM 2004, the Supreme Court of Pennsylvania held "AND NOW, this 16th day of August, 2004 the request for leave to file original process is granted and the Petition for Writ of Habeas Corpus is denied."

CONSTITUTIONALITY OF STATUTE OF STATE

28 U.S.C. §2403 (b) may apply to this proceeding. The Attorney General of Pennsylvania has been served with this Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

"... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment to the United States Constitution:

"...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

Fourteenth Amendment to the United States Constitution:

§1"....nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

On November 22, 1988, petitioner was convicted of the October 1981 slaying of Scott Rosenblum who was found shot to death in his apartment in Bensalem Township, Bucks County, Pennsylvania. The Honorable Issac S. Garb presided over the trial, sitting with a jury, in the Court of Common Please of Bucks County. The jury returned a guilty verdict of first degree murder and burglary, and a penalty hearing as to first degree murder was conducted immediately thereafter with the jury setting the penalty at life imprisonment.

This petition raises two fundamental issues: 1) whether the Bucks County District Attorney's Office is constitutionally bound to disclose evidence favorable to the accused, that is material to guilt, this Court has held in Brady v. Maryland, 373 U.S. 83, S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny and; 2) whether the Commonwealth of Pennsylvania has left a state avenue open to process a **BRADY** violation claim when evidence favorable to the accused, that is material to guilt, is disclosed by the Bucks County District Attorney's Office (13) years after the trial and conviction.

Because the August 16, 2004, opinion of the Supreme Court of Pennsylvania did not address the totality of the circumstances of the **BRADY** violation; or the failure to provide a state avenue to process a constitutional violation claim, petitioner will elaborate below.

CIRCUMSTANCES OF THE BRADY VIOLATION

Petitioner was taken into custody on July 12, 1988, in San Diego, California, under investigation for defrauding an innkeeper. Petitioner was transported to police department headquarters where he eventually identified himself and agreed to be questioned. Prior to the start of the interrogation, San Diego Detective Victor Colvin, conducted a warrant search through NCIC and received a response from the Bucks County Sheriff's Department that they had a warrant for petitioner's arrest. Detective Colvin and San Diego Detective Robert Tryon, conducted the interrogation and an audiotape was made of the proceeding along with a written police report prepared by Detective Tyron. Petitioner waived extradition from California and was transported to Pennsylvania by Richard Batezel, Detective, Bucks County District Attorney's Office and Kenneth Hopkins, Detective, Bensalem Township Police Department. Prior to leaving California, Detective Hopkins, took possession of the interrogation audiotape.

On July 22, 1988, an Arraignment was conducted before the Honorable Issac S. Garb and a plea of not guilty was entered. Petitioner was remanded to the custody of the Bucks County Sheriff's Department and was held in the Bucks County Prison pending trial without bail. Petitioner was unable to retain private defense counsel so Judge Garb appointed the Bucks County Public Defenders Office to represent him. Robert Suter, Esquire and Peter Hall, Esquire was assigned to the matter.

On August 29, 1988, Alan M. Rubinstein, District Attorney for Bucks County, Pennsylvania, sent a letter to Counsel for the petitioner, wherein, he says "Attached please find the discoverable materials currently in our file. We will forward any other relevant information we receive to you...oral statement by defendant not enclosed, contact this office for substance."

On September 14, 1988, counsel for the petitioner filed a Motion for Discovery pursuant to [Pa.R.Crim.P.rule 305 (a) (1988)] (Pa.R.Crim.P.rule 573 (2004), wherein they made quite specific requests for all **oral communications**:

> Request #1)"All statements, confessions, conversations, correspondence, and any written or oral communications the defendant made at any time before or after the death of Scott Rosenblum which the Commonwealth intends to introduce into evidence at any time during the trial of the above captioned matter, or at any pretrial or post trial proceedings.
>
> Request #14) "Please list the names of all persons whose tape recorded statements were obtained in connection with the prosecution of Commonwealth vs. Gary Kretchmar and/or the investigation of Scott Rosenblum.
>
> Request #15) "Please make available for copying all such tape recordings. Please preserve such tape recordings in the present form until final order of the court in this matter and neither erase nor destroy nor otherwise impair the usefulness of such tape.
>
> Request #41) "Please list any evidence or information favorable to the defendant which relates either to guilt or punishment which has not been heretofore requested, including but not limited to evidence or information which tends to weaken, impeach, or contradict other evidence or information, evidence which makes inculpatory evidence equivocal or casts doubt on other evidence or information which is inculpatory.

On September 20, 1988, Lawrence Cherba, District Attorney, filed discovery material along with a cover letter that said "Attached please find discoverable materials in possession of the Commonwealth. Pursuant to Rule of Criminal Procedure, rule 305, the Commonwealth will continue our duty to disclose as materials become available. I have received your formal request for discovery and will review same and respond accordingly. All discovery given to date has been on an informal basis."

On October 21, 1988, counsel for petitioner filed a Motion to Compel Discovery and Rule to Show Cause with the Court and Judge Garb issued an Order for the Commonwealth to "show why they should not be ordered to comply with the defendant's request for pre-trial discovery..."

In the Commonwealth's Answer to Request for Discovery, that was filed on October 25, 1988, A.D.A. Lawrence Cherba, stated:

Answer #1) "Reproduced and given to counsel on September 20, 1988

Answer #14) "Refused."

Answer #15) "Refused."

Answer #41) "None."

Due to the failure of the Bucks County District Attorney's Office to adhere to the discovery process, once again, counsel for the petitioner found it necessary to file another Motion to Compel Discovery on November 1, 1988, thirteen days before the trial was set to begin.

In answer to the Motion to Compel, A.D.A. Cherba filed additional discovery along with a cover letter that said "Attached please find additional discoverable materials in possession of the Commonwealth. Pursuant to Rule of Criminal Procedure 305, the Commonwealth will continue our duty to disclose as materials become available."

Trial proceedings in Commonwealth v. Gary Kretchmar, C.P. No. 1190-1/87, began on November 14, 1988 with Voir Dire for a death qualified jury. Opening arguments and direct testimony started on the afternoon of November 16, 1988. On direct examination Detective Tryon was questioned concerning the police report he prepared about the July 12, 1988 apprehension and interrogation of the petitioner where he wrote, in part, "...Kretchmar was unable to provide the name of the brother-in-law and stated that the **victim appeared to be shot in the head** and the homicide occurred in the late 70's, 1980 or 1981..." (Investigator's Report, Robert Tyron, July 15, 1988). Conversely, his testimony was, "when he first '**SAW**' the body he said the body had been shot in the head." (N.T. 11/17/88, Pg. 218, lines 22-23). **This portion of his testimony formed the foundation for the Commonwealth's case-in-chief,** in that, A.D.A. Cherba was later able to insinuate to the jury that only the killer would have knowledge of a gunshot wound to the head. In his closing argument A.D.A. Cherba argues to the jury:

> "...But even more important, what did he say to the San Diego officers? He says, I think he was shot in the head. Now, contrast that with what the other officers told you about finding a white male on the floor. And I asked them what was the first thing you observed? They all say, well, he was shot in the back, and on the white T-shirt we could see a blood stain.

Seven years after the fact what does the defendant gratuitously tell two San Diego Police Officers who have no knowledge about this case whatsoever to question him on? He gratuitously says, I think he was shot in the head. How does he now that, ladies and gentlemen? Ask yourself that. How does he know that? The only evidence that you have in this case of a wound to the head is the entrance wound, a contact wound, through the left ear. And there was no evidence by Dr Fillinger or anyone else that said there was an exit wound. Remember, Dr. Fillinger said it went up, pierced his brain and stopped at the other side before it exited the skull. The bullet never went out. How does he know he as shot in the head?

Look at C-15, see how Mr. Rosnblum is on the floor. Where is the left side of this face and the left ear? Against the floor. Mr. Lapkiewicz, his brother-in-law, do you remember his testimony when him and the defendant find the body? Who goes over and checks to see if he's alive? The brother-in-law, Dennis Lapkiewicz. He goes over and feels him. What does the defendant do? He leaves to go call the police or ambulance or whatever. He never gets near that body, never gets near, I submit to you, ladies and gentlemen, close enough to know that there's an entrance wound into Mr. Rosenblum's head through the left ear."

(N.T. 11/21/88, Pg. 69, lines 2-25 & Pg. 70, lines 1-11)

As noted supra, petitioner was convicted and through his direct appeal process both the Pennsylvania Superior Court and the Pennsylvania Supreme Court affirmed the conviction, while A.D.A. Cherba vigorously defended the assertion that petitioner stated that he **"SAW"** the gunshot wound to the head of Scott Rosenblum.

Petitioner subsequently filed a Post Conviction Relief Petition and Judge Garb appointed, Michael S. Goodwin, Esquire to represent him. Mr. Goodwin amended the petition and raised five issues, the main issue being: "Did trial counsel render ineffective assistance to the Defendant when trial counsel failed to obtain and introduce at trial newspaper clippings published during the days immediately following the killing, which revealed that the victim had been shot in the head? On June 2, 1994, a PCRA hearing was conducted before Judge Isaac S. Garb. Counsel for petitioner and Diane E. Gibbons, Assistant District Attorney, entered into a stipulation; "Turning, Your Honor, to my amendment, paragraph 1 (e), the Commonwealth and I, Ms. Gibbons and I agree that if a representative of the Bucks County Courier Times, of the Philadelphia Inquirer and of the Philadelphia Bulletin had been called to testify at trial, they would have appeared and they would have submitted copies of newspaper clippings, Your Honor." (N.T. 6/2/94, Pg. 10, lines 22-25 & Pg. 11, lines 1-4). Judge Garb once again affirmed the conviction of November 22,1988 as did both state appellate level courts. Even with the stipulation about the widely published newspaper articles stating the victim had been shot in the head, the new Assistant District Attorney assigned to the case, A.D.A. Gibbons continued to vigorously defend the assertion that petitioner stated that he **"SAW"** the gunshot wound to the head of Scott Rosenblum.

Petitioner then sought federal habeas review of his conviction. Thomas R. Quinn, Esquire was retained to file the habeas petition on behalf of petitioner. On February 9, 1999 at No. 98-1547, Thomas J. Rueter, United States Magistrate Judge "recommended that the petition for writ of habeas corpus be denied and that no certificate of appealability be granted." On February 25, 1999, U.S. District Court Judge Franklin S. Van Antwerpen adopted the Report and Recommendation. Petitioner tried unsuccessfully to obtain a

certificate of appealability from the Third Circuit Court of appeals. Again, a new Assistant District Attorney assigned to the case, A.D.A., Heather Castellino, continued to vigorously defend the assertion that petitioner stated that he **"SAW"** the gunshot wound to the head of Scott Rosenblum.

On January 18, 2002, an Affidavit in Support of Petition to Access Evidence was filed by David Avedissian, Esquire, new counsel representing petitioner, for "...access to review the Commonwealth's evidence from the trial of this case. Defendant is interested in reviewing the evidence for the limited purpose of replaying the tape-recorded statement taken by San Diego Police Department. In the event that defendant did not claim to have seen the wound, then the issue can be raised in defendant's Federal Habeas Corpus Petition."

On February 4, 2002, Karen A. Diaz, Chief Deputy District Attorney, a new Assistant District Attorney assigned to the case, sent Mr. Avedissian the tape: "Enclosed is a copy of the taped statement of the defendant taken by the San Diego Police Department on July 12, 1988." The tape was obtained by Bucks County Detective Thomas Thiel from the Bensalem Township Police Department on February 1, 2002.

The taped statement is 34 minutes and 55 seconds in length, however, the applicable portion of the tape states:

QUESTION (Detective Tryon) – **"What did it appear he died of?**

ANSWER (Petitioner/Kretchmar) – **"Shot in the head."**

Petitioner never uttered the word **"SAW"** or **"APPEARED."**

He made a statement of general knowledge, which was obtained from the three newspaper articles, as noted supra. In fact, Judge Issac S. Garb's opinion after Petitioner's 1994 PCRA hearing says, "The statement that he gave was that 'when he first **saw** the body...the body had been shot in the head.' **He did not tell Detective Tryon that Rosenblum had been shot in the head as a factual assertion. That knowledge could be attributable to information he received from the newspaper articles.** When Detective Tryon was asked if the defendant made a statement with respect to the body, he stated that when he first **saw** the body, it has been shot in the head. His statement was not one of general fact, but rather a statement of what he had observed when he first **saw** the body. Obviously, the genesis of that statement could not possibly have been newspaper articles." (Opinion and Order, Issac S. Garb, September 15, 1994).

FAILURE TO PROVIDE A STATE AVENUE TO PROCESS A CONSTITUTIONAL VIOLATION CLAIM

The February 4, 2002 disclosure of the July 12, 1988 interrogation audiotape provided counsel for petitioner with exculpatory or impeachment evidence that directly contradicted the November 17, 1988 trial testimony of Detective Tryon. For the first time since the November 22, 1988 conviction, petitioner's own words could prove that he never said that he "**SAW**" any wounds to Mr. Rosenblum's head.

Mr. Avedissian researched the Pennsylvania PCRA statute and determined that the filing of this after-discovered evidence or new reliable evidence in a PCRA Court would not qualify under one of the enumerated exceptions pursuant to 42 Pa. C.S.A. §9545 (b) (1) (ii). Accordingly, he decided that a state Writ of Habeas Corpus was the proper state method to **process the Brady violation claim.**

On April 25, 2002, Mr. Avedissian erroneously filed a Petition for Writ of Habeas Corpus, at civil law, with the Bucks County Prothonotary's Office. The Prothonotary's Office docketed the petition at Civil Case No. 02-2731 and accepted a fee of $164.00 to process the Petition. In the Commonwealth of Pennsylvania, the filing of a writ of habeas corpus is governed by Pa.R.Crim.P.rule 108, not a civil rule of court, so the filing and docketing of the writ should have never taken place. 42 Pa. C.S.A. 5103(c) establishes clear statutory procedures for interdivisional transfers of a matter.

When petitioner became aware of the erroneous filing in July 2002, he promptly fired Mr. Avedissian, by letter sent via certified mail on July 30, 2002. Within one week of that action, on August 7, 2002, the Honorable Ward F.Clark ruled that the erroneous petition for habeas corpus, at Civil Law No. 02-2731, was the same request for Access to Evidence as the January 18, 2002, Affidavit in Support of Petition to Access Evidence, the pleading that produced the audiotape disclosure.

In an attempt to rectify the situation on September 26, 2002 petitioner, in propria persona, filed a **Petition for Writ of Habeas Corpus Due To A Brady v. Maryland Due Process Violation,** under criminal law, at the original Criminal Prosecution No. 1190-1/87, in the proper venue, with the Clerk of Court of the Court of Common Pleas of Bucks County. Petitioner's pleading established the **Brady** violation and articulated the due diligence criteria necessary to obtain relief for his **Brady violation claim.** However, A.D.A. Karen A. Diaz, no longer asserted that petitioner said that he **"SAW"** the gunshot wound to the head, her new argument was that "the actual words of Petitioner in the taped interview taken in context, have the same meaning." A stark contrast to

the argument proffered by the District Attorney's Office prior to the February 4, 2002, disclosure of the interrogation audiotape. On October 1, 2002, Judge Clark **"REFUSED"** the petition for Writ of Habeas Corpus. On October 8, 2002, petitioner filed a Petition for Rehearing with the Court. On October 15, 2002, Judge Clark denied the petition for rehearing. On October 30, 2002, Judge Clark issued an Order pursuant to Pa.R.App.P.rule 1925, "The undersigned stands on its Opinion and Order of August 7, 2002."

Petitioner then filed a timely pro se Notice of Appeal and continued to seek a **state avenue to process his constitutional violation claim.** Again, petitioner's pleading established the **Brady** violation and articulated the due diligence criteria necessary to obtain relief for his **federal constitutional violation claim.** And once again, A.D.A. Karen A. Diaz, no longer asserted that petitioner said that he **"SAW"** the gunshot wound to the head, she argued that "the actual words of Petitioner in the taped interview, taken in context, have the same meaning." The Pennsylvania Superior Court docketed the matter at No. 3346 EDA 2002 and affirmed Judge Clark's decision on June 5, 2003. The Court held:

> "...Initially we observe that although appellant has labeled his Petition as a Petition for Writ of Habeas Corpus, it is properly considered a petition for relief under the PCRA. Commonwealth v. Lantzy, 558 Pa. 214, 736 A. 2d 564 (1999). Pursuant to §9545 of the Judicial Code, a PCRA petition must be filed within one year of the date the judgment becomes final unless the petitioner pleads and proves the existence of

> 1) interference by government officials in the presentation of the claim, 2) after-discovered facts or evidence, or 3) a later-recognized constitutional right. 42 Pa.C.S. §9545(b) (1). Appellant does not attempt to claim the applicability of any exception, but rather argues that his petition must be reviewed as a habeas corpus petition and not as a PCRA petition. As appellant's petition may be considered only under the PCRA, it is untimely as none of the exceptions to the timeliness requirements are applicable. Accordingly, the trial court properly dismissed the petition without a hearing. Order affirmed."

On June 12, 2003, petitioner, in propria persona, filed an Application for Reargument Before the Court En Banc. On July 31, 2003, the Court issued a Per Curium Order:

> "That the application filed June 12, 2003, requesting reargument/reconsideration of the decision dated June 5, 2003, is DENIED."

As a result of the appellate court's denial, petitioner, sought allowance of appeal to the Pennsylvania Supreme Court continuing to seek a **state avenue to process his constitutional violation claim.** Again, Petitioner's pleading established the **Brady** violation and articulated the due diligence criteria necessary to obtain relief for his **federal constitutional violation claim.** And once again, A.D.A. Karen A. Diaz, no longer asserted that petitioner said that he **"SAW"** the gunshot wound to the head, she argued that "the actual words of Petitioner in the taped interview, taken in context, have the same meaning." The court docketed the matter at No. 589 MAL 2003 and issued a Per Curium order on February 17, 2004:

"AND NOW, this 17th day of February, 2004 the Petition for Allowance of Appeal is hereby DENIED."

After the Pennsylvania Supreme Court's denial of the Petition for Allowance of Appeal, petitioner sought Authorization to File a Second or Successive Application for Relief under 28 U.S.C. §2254, which was not granted.

Thereafter, Petitioner, in Propria Persona, pursued a final **state court avenue to process his constitutional violation claim**, by imploring the Supreme Court of Pennsylvania to accept original jurisdiction of this matter. Again, Petitioner's pleading established the **Brady** violation and articulated the due diligence criteria necessary to obtain relief for his **federal constitutional violation claim.** A Petition for Writ of Habeas Corpus was filed pursuant to 42 Pa. C.S.A. §721 requesting consideration of the following question: If new reliable evidence that was not presented at trial, does not qualify for relief pursuant to one of the enumerated exceptions under 42 Pa. C.S. §9545 (b) (1) (ii), then is the new reliable evidence "newly presented" pursuant to Schlup v. Delo, 115 S.Ct. 851, 865 (1955)? And once again, A.D.A. Karen A. Diaz, no longer asserted that petitioner said that he **"SAW"** the gunshot wound to the head, she argued that the "actual words of Petitioner in the tape interview, taken in context, have the same meaning." As noted, supra, on August 16, 2004, at No. 84 MM 2004, the Supreme Court of Pennsylvania DENIED the Petition for Writ of Habeas Corpus.

REASON FOR GRANTING THE WRIT

Petitioner is before this Honorable Court of last resort to seek a redress of his constitutional violation grievances. Petitioner presents a facially cognizable constitutional claim, a claim of a **Brady** violation and a claim of actual innocence. Petitioner asserts that the Court below has decided an important federal question in a way that conflicts with relevant decisions of this Court.

BRADY VIOLATION ARGUMENT

Supreme Court precedent for a Fourteenth Amendment, due process violation claim, is well settled. In the latest **Brady** related decision Banks v. Dretke, 124 S.Ct. 1256 (2004), the Court held **"Brady** we reiterate, held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' 373 U.S., at 87, 83 S.Ct. 1194. We set out in Strickler v. Greene, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the three components or essential elements of a **Brady** prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S.,at 281-282, 119 S.Ct. 1936., id at 124 S. Ct. at 1272. "Unless suppressed evidence is 'material for **Brady** purposes, [its] suppression [does] not give rise to sufficient prejudice to overcome [a] procedural default." Strickler, 527 U.S. at 282, 119 S. Ct. 1936. Our touchtone on materiality is Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995). Kyles instructed that the materiality standard for

Brady claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435, 115 S.Ct. 1555., id at 124 S. Ct. 1276.

In this case Petitioner submits he has satisfied all three elements of a **Brady** prosecutorial misconduct claim; 1) the interrogation audiotape is favorable to the accused and is both exculpatory and impeaching. The actual words of petitioner remove the inference of guilt from the prosecutor's argument to the jury because petitioner never said he **"SAW"** the gunshot wound to the head. In addition, the actual words of petitioner contradict or impeach Detective Tryon's trial testimony, as well as, his police report account of the July 12, 1988 interrogation; 2) as noted in the statement of case, supra, defense counsel's September 14, 1988, Motion for Discovery and a Motion to Compel Discovery on two separate occasions clearly requested any oral communication in the possession of the Commonwealth; 3) the prejudice component is satisfied because with the suppression of the interrogation audiotape, petitioner was unable to prove that he never told Detective Tryon that he **"SAW"** a gunshot wound to the head of the victim, Scott Rosenblum. In fact, prejudice ensued through June 2, 1994 PCRA hearing because petitioner was unable to present his true words to Judge Garb.

In the Commonwealth of Pennsylvania, precedent for a Fourteenth Amendment, due process violation claim, is also well settled. "In order for a defendant to establish the existence of a **Brady** violation he must establish that there has been a suppression by the prosecution of either exculpatory or impeachment evidence that was favorable to the defendant, and that the omission of such evidence prejudiced the defendant"..."No **Brady** violation occurs where the parties

had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence." Commonwealth v. Grant, 813 A. 2d 727 (Pa.2002).

Under Pennsylvania standards, petitioner would meet the first criteria for a **Brady** violation. Petitioner has established that there was suppression by the prosecution of the July 12, 1988 interrogation audiotape that was exculpatory and impeachment evidence, which is favorable to the accused. The omission of such evidence absolutely prejudiced the petitioner. As for the other elements of the state **Brady** component, "equal access to the information" and/or "could have uncovered such evidence with reasonable diligence," petitioner asserts that they are in direct conflict with this Court's holding in Banks v. Dretke, supra. First, how does a defendant on trial for first-degree murder, facing the death penalty, have equal access to evidence in the possession of the Commonwealth unless it is disclosed? Second, defense counsel filed a Motion for Discovery and a Motion to Compel Discovery on two separate occasions that requested any oral communication in the possession of the Commonwealth, yet AD.A. Cherba still did not disclose the audiotape. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed **Brady** material when the prosecution represents that all such material has been disclosed"... "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process. 'Ordinarily, we presume that public officials have properly discharged their official duties." Banks, 124 S.Ct. at 1275.

Finally, petitioner asserts, A.D.A. Cherba and detective Tryon knew that petitioner did not verbally state that he **"SAW"** the gunshot wound to the head of the victim,

Scott Rosenblum, because they had the interrogation audiotape in their possession. Yet, A.D.A. Cherba allowed Detective Tryon to introduce a knowingly false police report and offer false evidence to the jury. It has long been established that the prosecution's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972) (quoting Mooney v. Holohan, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L.Ed. 791 (1935) (per curium)..."If it was reasonable for Banks to rely on the prosecution's full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction. See: Berger v. United States, 295 U.S. 78, 88 55 S. Ct. 629, 79 L.Ed 1314 (1935); Strickler, 527 U.S. at 284, 119 S. Ct. 1936." Banks, at 124 S. Ct. at 1274. **Like Banks,** in this case, since it was reasonable for the petitioner to rely on A.D.A. Cherba's full disclosure representation to defense counsel, it was also reasonable for petitioner to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction.

Pursuant to Kyles, the materiality standard for a **Brady** claim is met when favorable evidence could reasonably undermine confidence in the jury's verdict. Petitioner submits to this Honorable Court that the February 4, 2002 disclosure of the July 12, 1988 interrogation audiotape does just that. Detective Tryon testified about a statement that simply was never made. A.D.A. Cherba argued to the jury that because petitioner made the alleged statement he must be guilty, however, petitioner never made the statement. **Accordingly, confidence in the verdict cannot stand.**

FAILURE TO PROVIDE A STATE AVENUE TO PROCESS A CONSTITUTIONAL VIOLATION CLAIM ARGUMENT

"But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." Marbury v. Madison, 5 U.S. 137, (U.S.Dist.Col. 1803). Current case law in the Commonwealth of Pennsylvania has reached the point where it is impossible to find a **state avenue to process a constitutional violation claim** during collateral review of a criminal conviction. The Supreme Court of Pennsylvania has interpreted the state constitutional and statutory provisions controlling post conviction relief and habeas relief so rigidly that once an individual is convicted in the Commonwealth of Pennsylvania they are foreclosed from seeking effective redress of their convictions if they have been denied a vested legal right.

Petitioner presented a facially recognizable constitutional claim, a claim of a **Brady** violation and a claim of actual innocence to three levels of the Commonwealth of Pennsylvania – Unified Judicial System (Court of Common Pleas, Superior Court and Supreme Court). Petitioner has been denied at all levels, not on the merits of the constitutional violation, but because of the Pennsylvania PCRA and Appellate Courts inability to consider equitable concerns, as well as, complete indifference to petitioner's vested legal rights. This stands in direct conflict with previous rulings of this Court that have required "that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." Case v. Nebraska, 381 U.S. 336, 336-37 (1965); Young v. Ragen, 337 U.S. 235 (1949).

A quick review of a portion of the statement of case, supra, is appropriate here. After the February 4, 2002 disclosure of the July 12, 1988 interrogation audiotape, David Avedissian, Esquire, filed an erroneous petition for Writ of Habeas Corpus, in the wrong venue, under civil law, in the Court of Common Pleas of Bucks County. However, instead of following 42 Pa. C.S.A. §5103 (c) the Prothonotary docketed the matter in violation of the controlling state statute. Then on August 7, 2002, Senior Judge Ward F. Clark, Court of Common Pleas of Bucks County, actually rendered a decision on the erroneously filed petition. What is more confounding is that Judge Clark's decision draws a nexus between an Affidavit in Support of Petition to Access Evidence, [the pleading which produced the disclosure of the audiotape], and a Petition for Writ of Habeas Corpus that sates in paragraph #14) "Petitioner is jurisdictionally out of time for filing under the Post Conviction Relief Act. Based upon the foregoing, petitioner respectfully requests the issuance of a writ of habeas corpus so that a hearing may be conducted in furtherance of the claim set forth herein." Then to further exacerbate the circumstances both the Superior Court, at No. 3346 EDA 2002, and the Supreme Court, at No. 589 MAL 2003, allowed this set of judicial acts to stand when they denied petitioner's subsequent appeal.

This snapshot of the total disregard by (3) levels of the Commonwealth of Pennsylvania – Unified Judicial System for petitioner's federal constitutional violation claim demonstrates the quagmire that he is in. Even after trying to resuscitate the process to seek a state avenue for the redress of his **Brady** violation claim, by filing a habeas petition in the proper venue, the state courts rejected the claim, not on the federal constitutional merits, but because "appellant's petition may be considered only under the PCRA, it is untimely as

none of the exceptions to the timeliness requirement are applicable. Accordingly, the trial court properly dismissed the petition without a hearing." (Order, Superior Court of Pennsylvania, No. 3346 EDA 2002, June 5, 2003).

A review of the State Constitution, Statutes, and controlling case law governing collateral review of criminal convictions follows:

> Article 1, Section 14 of the Pennsylvania Constitution reads:
>
> "...and the privilege of the writ of habeas corpus shall not be suspended."
>
> 42 Pa C.S.A. §6503 (b) reads:
>
> "Where a person is restrained by virtue of sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law."

The PCRA Time-Bar Exceptions, 42 Pa. C.S.A. §9545 (b) (1) are:

> Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this

Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section has been held by that court to apply retroactively.

42 Pa. C.S.A. §9545(b) (2) further provides that: Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

In a recent decision by the Supreme Court of Pennsylvania, Commonwealth v. Cruz, 852 A.2d. 292 (Pa. 2004), Justice Castille, writing for the majority said, "This Court has held that the PCRA's time restriction is constitutionally valid. See: Commonwealth v. Peterkin, 554 Pa. 547, 722 A.2d. 638, 643 (1998) ("the PCRA's time limitation upon the filing of PCRA petitions does not unreasonably or unconstitutionally limit [an appellant's] constitutional right to habeas corpus relief.") Furthermore, we have held that the PCRA time limits are jurisdictional in nature, implicating a court's very power to adjudicate a controversy. See: Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214 (1999). Accordingly, the "period for filing a PCRA petition is not subject to the doctrine of equitable tolling;"

instead, the time for filing a PCRA petition can be extended only to the extent that the PCRA permits it to be extended, i.e., by operation of one of the statutorily enumerated exceptions to the PCRA time-bar. Id at 222. More recently, in Commonwealth v. Robinson, 575 Pa. 500, 837 A.2d 1157 (2003), we recounted this Court's rejection of 'various theories devised to avoid the effects of the one-year time limitation' of the PCRA. Id at 1157 (collecting cases). In Robinson, we reiterated the strictly jurisdictional nature of the PCRA time-bar and that 'the PCRA confers no authority upon this Court to fashion ad hoc equitable exceptions to the PCRA time-bar in addition to those exceptions expressly delineated in the Act.' Id. at 1161 (quoting Commonwealth v. Eller, 569 Pa. 622, 807 A. 2d 838, 845 (2002)."

Conversely in Com. Ex. Rel.Dadario v. Goldberg, 773 A. 2d 130 (Pa. 2001), the Supreme Court of Pennsylvania held "In Peterkin, supra, we found that the 'legislature intended that the writ [of habeas corpus] would continue to exist as a separate remedy' but 'only in cases in which there is no remedy under the PCRA.' Id at 640. We reinforced this view in Commonwealth v. Fahy, 558 Pa. 313, 737 A. 2d 214, 223-24 (1999); 'a writ for habeas corpus continues to exist as a separate remedy. Even so, the writ continues to exist as an independent basis for relief only in cases in which there is no remedy under the PCRA."

To further amplify the problem that exists in Pennsylvania with the controlling caselaw for collateral review of criminal convictions, on February 4, 2004 the Superior Court of Pennsylvania QUASHED an appeal in the matter of Commonwealth v. Bennett, 842 A. 2d 953 (Pa. Super. 2004). Writing for the majority, Judge Todd said "The inability to consider equitable concerns has led inexorably to the point, of which we believe this case to be an example,

where the resulting injustice becomes one of constitutional magnitude. There is a legitimate argument that, under the circumstances of this case, Bennett's constitutional right to appeal, his right to effective counsel, or his right to a writ of habeas corpus has been unconstitutionally thwarted by the PCRA time limitations. Recognizing, however, that our Supreme Court has held that the time limitations of the PCRA are constitutional, see Peterkin, 554 Pa. At 557-58, 722 A.2d at 642-43 (PCRA time limitations are constitutionally reasonable; they do not "unreasonably or unconstitutionally limit [appellant's] constitutional right to habeas corpus relief"), we must leave to our high Court's prerogative the decision whether to review the constitutional dimensions of Bennett's deprivations.

The criminal conviction collateral review process in Pennsylvania is so convoluted that a majority panel of the Superior Court is questioning the wisdom of the Supreme Court's PCRA time-bar exceptions holding. So petitioner asks this Honorable Court, if his facially cognizable **Brady** violation claim does not qualify for relief in Pennsylvania under one of the enumerated PCRA time-bar exceptions and/or State Habeas Corpus Statute, do the Pennsylvania PCRA and Appellate Courts have a judicial obligation to recognize the "fundamental-miscarriage-of-justice exception articulated by this Court in Schlup v Delo, 513 U.S. 298, 130 L.Ed.2d 808, 115 S.Ct. 851 (l995)? In Schlup the Court held that to support a colorable claim of actual innocence the petitioner must come forward with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." Id at 324. The petitioner must also establish that "it was more likely than not that no reasonable juror would have

convicted him in light of the new evidence." Id at 327. Clearly, the July 12, 1988 interrogation audiotape that contains petitioner's true statement to Detective Tryon, that was not presented at trial, can be construed as "new reliable evidence."

As Mr. Chief Justice Marshall stated while delivering the opinion for this Honorable Court in Marbury v. Madison, supra, "If courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply." Id at 137. **The First Amendment to the Constitution of the United States** guarantees the right to "petition the Government for a redress of grievances." Petitioner has petitioned the Commonwealth of Pennsylvania – Unified Judicial System for a redress of his **Brady** violation grievance and has found no adequate remedy at law.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment of the Supreme Court of Pennsylvania entered herein.

Dated: November 10, 2004

Respectfully submitted,

Gary L. Kretchmar, AS-2147
In Propria Persona
SCI-Graterford
P.O. Box 244
Graterford, PA 19426-0244

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

GARY L. KRETCHMAR No. 84 MM 2004

PETITIONER V.

DAVID DIGUGLIELMO,
Respondent

ORDER

PER CURIAM

AND NOW, this 16th day of August 2004, the request for leave to file original process is granted and the Petition for Writ of Habeas Corpus is denied.

TRUE & CORRECT COPY

ATTEST:
AUG 16 2004

/s/ SHIRLEY BAILEY
SHIRLEY BAILEY

CHIEF CLERK

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Respondent

No. 589 MAL 2003
Petition for Allowance of Appeal from the Order of the Superior Court

V.

GARY L.KRETCHMAR,
Petitioner

ORDER

PER CURIAM

AND NOW, this 17th day of February 2004, the Petition for Allowance of Appeal is hereby DENIED.

TRUE & CORRECT COPY
ATTEST:
FEB 17 2004

/c/ SHTRT.FY RAIT.FY
SHIRLEY BAILEY
CHIEF CLERK

J. S21043/03

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF PENNSYLVANIA

Appellee

V

GARY L. KRETCHMAR

APPELLANT

No. 3346 EDA 2002

ORDER

AND NOW, this 31st day of July 2003, IT IS HEREBY ORDERED:

THAT the application filed June 12, 2003, requesting reargument/reconsideration of the decision dated June 5, 2003, is DENIED. PER CURIAM

COMMONWEALTH OF PENNSYLVANIA, Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

V.

GARY L. KRETCHMAR, Appellant:

No. 3346 EDA 2002

Appeal from the Order entered October 1, 2002, in the Court of Common Pleas, Bucks County, Civil, No., 87-1190-1

BEFORE: STEVENS, BOWES, JJ, and McEWEN, P.J.E.

MEMORANDUM: FILED JUNE 5, 2003

Appellant, Gary L. Kretchmar, has taken this pro se appeal from the order, which dismissed, without a hearing, his pro se petition for habeas corpus relief. We affirm.

Appellant was convicted, following a jury trial, of first degree murder and burglary on November 22, 1988, and was sentenced to life imprisonment. This Court affirmed the judgment of sentence on direct appeal, and the Pennsylvania Supreme Court denied allocatur by order dated April 30, 1991; Appellant filed a pro se petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546, whereupon counsel was appointed and caused an amended petition to be filed. Following a hearing, the trial court dismissed the petition by order dated September 15, 1994. This Court affirmed the order of dismissal, and the Supreme Court granted allowance of appeal by order dated August 7, 1996. **Commonwealth v. Kretchmar,** 545 Pa. 41, 679 A.2d 774 (1996). The Supreme Court later dismissed the appeal as improvidently granted. **Commonwealth v. Kretchmar,** 547 Pa. 358, 690 A.2d 234 (1997).

On January 23, 2002, appellant filed a counseled Petition which requested that the trial court compel the Commonwealth to release an audio taped copy of the Statement appellee had made to San Diego police Investigators. The tape was supplied to appellant. Appellant Then filed a pro se petition seeking habeas corpus relief on September 26, 2002. The distinguished Senior Judge Ward F. Clark dismissed the petition without a hearing on October 1, 2002, and this appeal followed.

Appellant, in his brief submitted in support of this Appeal, raises four issues for our review:

> Did the Commonwealth's Attorney, Larry Cherba, Esquire, deny Appellant his rights and privileges secured by the 5th and 14th Amendments to the United States Constitution, Article 1, Section 1 of the Pennsylvania Constitution, and Article 1, Section 9 of the Pennsylvania Constitution by withholding the audio taped interrogation taken by San Diego Police Detectives Victor Colvin and Robert Tryon?

> Did the Office of the Prothonotary for the Bucks County Court of Common Pleas violate Pa.R.A.P. 751(a) by accepting and processing an erroneously filed Petition for Writ of Habeas Corpus?

Did the lower court err in its determination to refuse Appellant's Petition for Writ of Habeas Corpus Due to a **Brady v. Maryland** Due Process violation thus precluding

1 From the representations made by appellant and the Commonwealth, it appears that appellant subsequently filed a petition seeking habeas corpus relief on April 25, 2002, and that, thereafter, on August 7, 2002, the trial court dismissed the petition without a hearing. The record before us does not contain appellant's original filing.

An adequate corrective process for the hearing and determination of Appellant's federal constitutional claims?

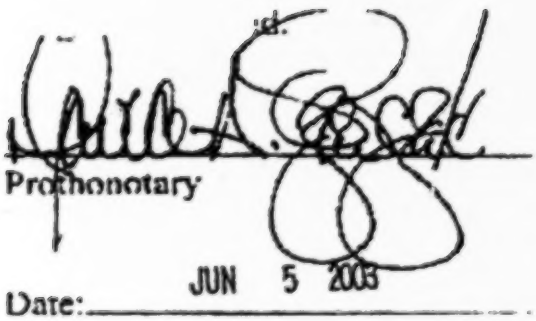
Did Appellate Counsel, David Avedissian, Esquire, provide ineffective assistance of counsel in his determination that appellant could not pursue his claims of federal constitutional violations through the Post Conviction Relief Act?

Initially we observe that, although appellant has labeled his petition as a Petition for Writ of Habeas Corpus, it is properly considered a petition for relief under the PCRA. **Commonwealth v. Lantzy,** 558 Pa. 214, 736 A.2d 564 (1999). Pursuant to Section 9545 of the Judicial Code, a PCRA petition must be filed within one year of the date the judgment becomes final unless the petitioner pleads and proves the existence of 1) interference by government officials in the presentation of the claim, 2) after-discovered facts or evidence, or 3) a later-recognized constitutional right. 42 Pa.C.S. § 9545(b)(1). Appellant does not attempt to claim the applicability of any exception, but rather argues that his petition must be reviewed as a habeas corpus petition and not as a PCRA petition. As appellant's petition may be considered only under the PCRA, it is untimely as none of the exceptions to the timeliness requirement are applicable. Accordingly, the trial court properly dismissed the petition without a hearing.

Order affirmed.

BOWES, J., CONCURS IN THE RESULT.

1. S21043/03



IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA
VS.

NO. 1987-1190

GARY L. KRETCHMAR

OPINION PURSUANT TO PA RULE OF APPELATE PROCEDURE 1925

The undersigned stands on its Opinion and Order of August 7, 2002.

Respectfully submitted,
/s/ WARD F. CLARK, J.
WARD F. CLARK
SENIOR JUDGE

DATE: 10/30/02

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA
VS.

NO. 1987-1190

GARY L. KRETCHMAR

ORDER

AND NOW, this 15th day of October 2002, upon consideration of the within petition, a hearing on the Petition for Rehearing is hereby Denied.

BY THE COURT,

/s/ WARD F. CLARK J.
WARD F. CLARK SENIOR JUDGE

IN THE COURT OF COMMON PLEAS
OF BUCKS COUNTY, PENNSYLVANIA

GARY L. KRETCHMAR,
Petitioner
Vs. C.P. No. 87-1190-1

DONALD T. VAUGHN
Superintendent of the State
Correctional Institution
At Graterford or his designees,
Respondent

RULE TO SHOW CAUSE WITHOUT TEMPORARY RESTRAINTS

AND NOW, to wit, it is on this 1st day of October 2002, upon consideration of the within petition, ~~a rule is hereby entered upon respondents to show cause, if any, why the prayers of the within petition should not be granted.~~

~~A HEARING is fixed for the day of 2002, at .m., in Courtroom No., in the Court of Common Pleas of Bucks County, at the court house in Doylestown, Pennsylvania.~~

Refused.

J. J. J. Clark

IN THE COURT OF COMMON PLEAS OF
BUCKS COUNTY, PENNSYLVANIA

GARY L. KRETCHMAR, C.P. No. 87-1190-1

Petitioner

vs.

DONALD T. VAUGHN
Superintendent of the
State Correctional Institute
At Graterford or his Designees,
Respondent

RULE TO SHOW CAUSE WITHOUT TEMPORARY RESTRAINTS

AND NOW, to wit, it is on this day of 2002, upon consideration of the within petition, a rule is hereby entered upon respondents to show cause, if any, why the prayers of the within petition should not be granted.

A HEARING is fixed for the day of 2002, at .m., in Courtroom No., in the Court of Common Pleas of Bucks County, at the court house in Doylestown, Pennsylvania.

IN THE COURT OF COMMON PLEAS OF
BUCKS COUNTY, PENNSYLVANIA

GARY L. KRETCHMAR,

Petitioner

Vs. C.P. No. 87-1190-1

DONALD T. VAUGHN
Superintendent of the State
Correctional Institution
At Graterford or his designees,
Respondent

PETITION FOR WRIT OF HABEAS CORPUS DUE TO A

BRADY v. MARYLAND DUE PROCESS VIOLATION

Petitioner, GARY L. KRETCHMAR, In Propria Persona,

requests this Court to issue a Writ of Habeas

Corpus, and represents:

1. Petitioner files this Petition for Writ of Habeas Corpus pursuant to Pa.Const.Art.1, sec.14; and Pa.R.Crim.P. Rule 108.

2. Petitioner was tried by a jury of his peers in the Court of Common Pleas of Bucks County before the Honorable Isaac S. Garb.

3. The Commonwealth was represented at trial by Assistant District Attorney Larry Cherba, Esq.

4. Petitioner was represented at trial by First Public Defender Robert W. Suter, Esq., and Assistant Public Defender Peter Hall, Esq., of the Bucks County Public Defenders office.

5. On September 14, 1988, Robert W. Suter, Esq., filed a Motion for Pre-Trial Discovery and Inspection of (42) different categories of evidence in the possession of the Commonwealth, including but not limited to:

1) All statements, confessions, conversations, correspondence, and any written or oral communications of the defendant made at any time before or after the death of Scott Rosenblum Which the Commonwealth intends to introduce into evidence at any time during the trial of the above-captioned matter, or at any pre-trial or post-trial proceedings. (See: Appendix A). 2) All statements, confessions, conversations, correspondence, and any written or oral communications of the defendant made at any time before or after the death of Scott Rosenblum which the Commonwealth has obtained and which the Commonwealth does not intend to offer into evidence at any stage of the litigation in the above captioned matter; including, but not limited to, the police tape of the report of the death of Scott Rosenblum. (See: Appendix A).

6. On October 24, 1988 and again on November 1, 1988, Robert W. Suter, Esq. filed a Motion to Compel Discovery and Rule to Show Cause because the Commonwealth had failed to answer the original pre-trial discovery request of September 14, 1988.
(See: Appendix B).

7. On November 1, 1988 the Commonwealth's Attorney, Larry Cherba, Esq., filed discoverable material with the Clerk of Court.

8. On November 17, 1988, San Diego Police Detectives Victor Colvin and Robert Tryon testified for the Commonwealth at the trial of Commonwealth v. Gary L. Kretchmar, No. 87-1190-1. Detective Colvin testified about a taped statement the Petitioner/defendant made upon his arrest in San Diego, CA on July 12, 1988, wherein, Detective Colvin testified: **"He told me his only involvement with the murder in Pennsylvania was the fact that he had found the body." (N.T.** 11/17/88, Pg. 214, lines 17-18). Detective Robert Tryon testified about a taped interview that was conducted with Petitioner/defendant upon his arrest in San Diego, CA on July 12, 1988, wherein, Detective Tryon testified: **"When he first saw the body he said the body had been shot in the head." (N.T.** 11/17/88, Pg. 218, lines 2223).

9. On November 22, 1988, following the jury trial, petitioner/defendant was convicted of the 1981 slaying of Scott Rosenblum. Petitioner/defendant was also found guilty of burglary with respect to the underlying incident.

10. Petitioner, through (3) different Appellate Counsel, filed a direct appeal of his conviction, PCRA appeal, and a Federal Habeas Corpus appeal, which were all dismissed citing the testimony of the San Diego Detective Robert Tryon, (in paragraph 8 above).

11. On January 23, 2002, David Avedissian, Esq., private counsel for the defendant, filed an Affidavit in Support of Petition to Access Evidence with the Clerk of Court. The Petition requested "access to review the Commonwealth's evidence from the trial of this case. Defendant is interested in reviewing the evidence for the limited purpose of replaying the tape recorded statement taken by San Diego Police Department." (See: Appendix C).

12. On February 5, 2002, Assistant District Attorney Karen A. Diaz, Esq., mailed David Avedissian, Esq., a copy of the audio taped police interrogation that San Diego Police Detectives Victor Colvin and Robert Tryon conducted when they arrested Petitioner/defendant, Gary L. Kretchmar, in San Diego, CA on July 12, 1988. **THIS WAS THE FIRST TIME THAT THE COMMONWEALTH PROVIDED SAID AUDIO TAPE TO THE PETITIONER/DEFENDANT and/or his COUNSEL,** thus denying defendant his rights and privileges secured by the 14th Amendment to the United States Constitution; Article 1, section 9 of the Pennsylvania Constitution; and Pennsylvania Rules of Criminal Procedure 573 (previously rules 304 and 305 in November 1988).

13. Upon receiving the audio taped interrogation of petitioner/defendant from July 12, 1988, David Avedissian, Esq. and petitioner/defendant reviewed the contents. Detective Tryon's testimony that petitioner/defendant said he "saw" the victim had been shot in the head **was directly controverted by defendant's recorded statement.** Specifically, when questioned by Detective Tryon "how did he appear to have been killed?" defendant responded with **"shot in the head."** Defendant never testified that he **"saw"** anything. Based on the limited evidence presented in this case, the result of the trial would likely have been different in the event that the tape had actually been played to the jury and utilized in the cross examination of the detective. "The withholding of evidence by the prosecution, see Brady v. Maryland, 373 U.S. 83, 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963), denied him the full panoply of protections afforded to criminal defendants by the Constitution. Schlup v. Delo, cited as 115 S.Ct. 851 (1995).

14. On March 7, 2002 the Honorable Kenneth G. Biehn dismissed the aforementioned Affidavit in Support of Petition to Access Evidence, as being "Moot".

15. On April 25, 2002, David Avedissian, Esq., on behalf of petitioner/defendant, filed an erroneous petition for Writ of Habeas Corpus with the office of the Prothonotary for the Court of Common Pleas of Bucks County-Civil Division, requesting a hearing on the evidence that was gleaned from the audio taped interview that directly contradicts the false testimony offered by San Diego Detective Robert Tryon, at (N.T. 11/17/88, Pg. 218, lines 22-23). The Petition was erroneously docketed at No. 02-2731 and adjudicated by the Honorable Ward F. Clark, Senior Judge, as being the same request as the aforementioned Affidavit in Support of Petition to Access Evidence, (in paragraph 11 above). Petitioner asserts that the Office of the Prothonotary for the Court of Common Pleas of Bucks County violated Pa.R.App.P. Rule 751 (a) Transfer of Erroneously Filed Cases. Thus the instant Petition that Pro Se Petitioner is filing with this Honorable Court should be tolled from April 25, 2002. (See: Appendix D).

16. On July 30, 2002, Petitioner, advised privately retained counsel, David Avedissian, Esq., that he was fired, by certified letter. (See: Appendix E).

17. On July 30, 2002, Petitioner, advised the Clerk of Court that David Avedissian, Esq., would no longer be representing petitioner/defendant in future proceedings. (See: Appendix F).

18. On August 13, 2002, Petitioner, advised the office of the Prothonotary that David Avedissian, Esq., would no longer be representing petitioner/defendant in future proceedings. (See: Appendix G).

19. On August 7, 2002, the Honorable Ward F. Clark, Senior Judge, dismissed the erroneously filed Petition for Writ of Habeas Corpus.

20. On September 5, 2002, Petitioner, signed for legal mail at the SCI-Graterford mailroom. Petitioner received from David Avedissian, Esq., Judge Clark's August 7th Order dismissing the erroneously filed Habeas Corpus Petition, as well as, a letter to Judge Clark asking "that the court permit petitioner to present his argument for consideration" concerning the dismissal of the Petition. (See: Appendix H)

21. On September 9, 2002, Pro Se Petitioner wrote a letter to David Avedissian, Esq., informing him that Petitioner would not be appealing Judge Clark's dismissal of the erroneously filed Writ of Habeas Corpus because it was filed in the wrong venue. (See: Appendix I).

22. Petitioner, In Propria Persona, submits to this honorable court a Petition for Writ of Habeas Corpus and requests that a hearing be conducted in furtherance of the following claims:

A) Petitioner asserts his Innocence and a failure to Conduct a fair and thorough hearing on the Aforementioned **Brady v. Maryland Due Process Claim, and its progency;** will result in a Continuing Miscarriage of Justice.

B) The Commonwealth's withholding of evidence, the audio tape interrogation of petitioner/defendant, taken by San Diego Police Detectives Colvin and Tryon until February 5, 2002, denied petitioner/defendant his rights and privileges secured by the 5th and 14th Amendment to the United States Constitution; Article 1, section 1 of the Pennsylvania Constitution, and Article 1, section 9 of the Pennsylvania Constitution.

C) Petitioner's due process rights under the 14th Amendment to the United States Constitution "require that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." Case v. Nebraska, 381 U.S. 336, 336-37 (1965).

23. Petitioner, in Propria Persona request to leave to submit to leave a supporting Memorandum of Law within 10 days. Statements and Grounds for Relief asserted therein are incorporated by reference.

WHEREFORE, this Honorable Court is requested to issue a writ of habeas corpus and order a hearing FORTHWITH.

Respectfully submitted,
/s/ GARY L. KRETCHMAR
Gary L Kretchmar
In Propria Persona

IN THE COURT OF COMMON PLEAS OF
BUCKS COUNTY, PENNSYLVANIA

GARY L. KRETCHMAR,

Petitioner

Vs. C. P. No. 87-1190-1

DONALD T. VAUGHN
Superintendent of the State
Correctional Institution at
Graterford or his designees,
Respondent

CERTIFICATE OF SERVICE

Gary L. Kretchmar, In Propria Persona, certifies that a copy of the foregoing document was served upon the below listed individuals in the manner indicated below, which service satisfies the requirements of Pa.R.Cr.P. Rule 121:

Service by First Class Mail as follows:

Mary K. Smithson,

Court of Common Pleas
Courthouse
55 E. Court Street
Doylestown, PA 18901
(Via certified mail delivery)

Karen A. Diaz, Esquire
Office of the District Attorney
55 E. Court Street
Doylestown, PA 18901
(ATTORNEY FOR THE
COMMONWEALTH)

/s/ GARY L. KRETCHMAR
Gary L. Kretchmar, AS-2147
In Propria Persona SCI- Grater ford
P.O. Box 244
Graterford, PA 19426-0244

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CIVIL DIVISION

GARY L. KRETCHMAR, NO. 02-2731
Petitioner
Vs.

DONALD T. VAUGHN,
Superintendent of the State
Correctional Institution at
Graterford or his designees
Respondent

OPINION AND ORDER

PROCEDURAL HISTORY

a) Petitioner, Gary L. Kretchmar, was convicted by a Bucks County jury on November 22, 1988 of First Degree Murder.

b) This conviction was affirmed by the Pennsylvania Superior Court on May 8,1990.

c) Allocature was denied on April 30, 1991

d) A PCRA petition was filed on October 18, 1993 and denied on September15, 1994.

e) This denial was affirmed by the Pa. Superior Court on May 29, 1995.

f) On February 26, 2002, defendant filed a petition in this Court for a hearing in an effort to obtain a legal piece of evidence.

g) The evidence sought by defendant was an alleged tape-recorded statement given by defendant to the San Diego Police Department.

h) Judge Kenneth G. Biehn of this Court held a hearing on that matter on March 7, 2002, and at the conclusion thereof, Judge Biehn denied the request.

i) No appeal was taken from that disposition.

j) On April 25, 2002, defendant filed a petition for a Writ of Habeas Corpus to obtain a hearing raising exactly the same issue previously decided by the aforesaid Judge Kenneth G. Biehn.

k) This petition came before the undersigned.

DISCUSSION

The undersigned is bound by the disposition rendered by Judge Biehn on March 7, 2002. Therefore, the following is rendered:

ORDER

AND NOW, this 7TH day of August 2002, the Petition to set a hearing on this Application for a Writ of Habeas Corpus is denied and refused.

BY THE COURT,

/s/ WARD F. CLARK, J.

WARD F. CLARK SENIOR JUDGE

Copies sent to:

David A. Avedissian, Esquire
Bafundo, Porter, Eorhi & Clancy
1940 E. Route 70
Cherry Hill, NJ 08034
Attorney for Defendant

Karen A. Diaz, Esquire
Office of the District Attorney
55 E. Court Street
Doylestown, PA 18901
Attorney for the Commonwealth

COURT OF COMMON PLEAS
OF BUCKS COUNTY
OFFICE
OF
COURT ADMINISTRATOR
DOYLESTOWN, PA 18901

CIVIL COVER SHEET

The information provided herein is for case flow and calendar management purposes only. It does not replace c supplement the filing and service of pleadings or other papers as required by law or rules of court. This sheet will NC be used as a source for making docket entries except to note the type of action commenced. This is not a substitute from documents for commencement of actions

Case No. 0202731-27-6

PLAINTIFFS	VS.	DEFENDANTS
GARY KRETCHMAR 81450		Donald T. Vaughn, Superintendent of the State Correctional Institution at Graterford
		Attorney Name & ID #

NATURE OF SUIT

(Check one classification only)

CONTRACTS	TORTS
Mechanics Lien 057	Motor Vehicle 047
Employment 525	Non-Motor Vehicle 048
Insurance 526	Other Personal Injury 049
No-Fault Insurance 527	Assault 532
Negotiable Instrument 528	Libel/ Slander 533
Product Liability 529	Medical/Malpractice 534

Warranty 530
Mortgage Foreclosure 060
Replevin (With Order) 054
Assumpsit 046
Other 531

Legal Malpractice
Product Warranty
Other 537

APPEALS

DJ.Appeal - Assumpsit's 025
DJ Appeal - Trespass 337
Award of Viewers 501
Board of Assessment 301
Pa. Labor Relations Board 369
Board of Elections 31
Local Agency 262
Zoning Hearing Board 030
Suspension of Operator's License 134
Suspension of Registration 694
xx other 538

EQUITY

Ejectment 053
Partition 309
Quiet Title 062
Labor Dispute 540
Mandamus 055
Declaratory Judgment 061
Equity 051
Quo Warranto 056
Other 53

DEMAND _____ JURY DEMAND

over $50,000_____
Under $50,000_____

(Check only if demanded in Complaint.)

Not Applicable _____ _____Yes _____No

IN THE COURT OF COMMON PLEAS OF THE COUNTY OF BUCKS PENNSYLVANIA

GARY L. KRETCHMAR,
Petitioner,

Civil NO. 0202731

Vs.

DONALD T. VAUGHN,
Superintendent of the State Correctional Institution at Graterford or his designees

PETITION FOR WRIT OF HABEUS CORPUS

Respondent.

Petitioner, Gary L. Kretchmar, through the undersigned counsel, hereby seeks a writ of habeas corpus on the following grounds.

1. On November 22, 1988, following a jury trial, petitioner was convicted of the 1981 slaying of Scott Rosenblum. Defendant was also found guilty of burglary with respect to the underlying incident.
2. Defendant has exhausted all of his direct appeals with respect to the underlying conviction.
3. The case was tried before the Honorable Isaac Gaarb and the Commonwealth's case was presented by Assistant District Attorney Larry Cherba.
4. In affirming defendant's conviction, all of the courts have stressed the importance of a recorded statement which defendant gave to the San Diego Police, which apparently establishes his guilt.

5. At the trial, Detective Tyron of the San Diego Police Department, provided testimony about a taped statement obtained from defendant prior to trial. The detective testified that defendant stated "when he first saw the body he saw that the victim had been shot in the head." This evidence was especially damming because the wound was not discovered until the victim's autopsy was conducted. The inference was that defendant knew that there was a wound in the victim's head because he had inflicted same.

6. This testimony and evidence was emphasized by all courts considering the appeals of this case. (See copies of decisions attached herewith as Exhibit "A").

7. None of defendant's prior attorneys ever requested a copy of the tape recorded statement to actually hear what defendant said.

8. The undersigned counsel has requested and received a copy of the recorded statement and reviewed. the contents of same.

9. Detective Tryon's testimony that defendant/petitioner said he "saw" the victim had been shot in the head was directly controverted by defendant's recorded statement. Specifically, when questioned by Detective Tryon "[h]ow did he appear to have been killed?", defendant responded with "[s]hot in the head."

10. Defendant never testified that he "saw" anything.

11. Based on the limited evidence presented in this case, the result of the trial would likely have been different in the event that the tape had actually been played to the jury and utilized in the cross examination of the detective. This could have been accomplished without necessitating defendant's testimony.

12. This application is made on behalf of defendant for a writ of habeas corpus.

13. Pursuant to Commonwealth v. Peterkin, 554 Pa547 (1999), the writ of habeas corpus continues to exist as a separate remedy in cases in which there is no remedy under the PCRA.

14. Petitioner is jurisdictionally out of time for filing under the Post Conviction Relief Act.

Based upon the foregoing, petitioner respectfully requests the issuance of a writ of habeas corpus so that a hearing may be conducted in furtherance of the claims set forth herein.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing are willfully false I am subject to punishment.

/s/ David A. Avedissian

David A. Avedissian, Esq.

COURT OF COMMON PLEAS OF BUCKS COUNTY,
PENNSYLVANIA
CIVIL ACTION - LAW

GARY L. KRETCHMAR,
Petitioner,

COURT OF COMMON PLEAS
OF PENNSYLVANIA
BUCKS COUNTY

vs.

DONALD T. VAUGHN,
Superintendent of the State
Correctional Institution
at Graterford or his designees

Attorney I.D. # 81450

Respondent.

AND NOW, to wit, it is on this day of 2002, upon consideration of the within petition, a rule is hereby entered upon respondents to show cause, if any, why the prayers of the within petition should not be granted.

A hearing is fixed for the day of 2002, at .m., in Courtroom No. , in the Court of Common Pleas of Bucks County, at the court house in Doylestown, Pennsylvania.

J.

OFFICE OF THE DISTRICT ATTORNEY
BUCKS COUNTY COURTHOUSE
DOYLESTOWN, PENNSYLVANIA 18901

February 4, 2002

David A. Avedissian, Esquire
1940 East State Highway No. 70
P.O. Box 5372
Cherry Hill, NJ 08034-0466

RE: Commonwealth v. Kretchmar #1190/87

Dear Mr. Avedissian:

Enclosed is a copy of the taped statement of the defendant taken by the San Diego Police Department on July 12, 1988.

Sincerely,

Karen A. Diaz
Chief Deputy District
Attorney

BUCKS COUNTY DETECTIVE

2002-26-27
FILE NUMBER

COPY

January 31, 2002

Title: Rosenblum Homicide- Assist Bensalem Twp.
Arrested: Gary Kretchmar

Investigation:

On this date, Chief Deputy District Attorney **Karen Diaz** requested that I obtain the taped statement of **Gary Kretchmar** given to the San Diego Police Dept. This statement was made pursuant to **Kretchmar's** arrest in 1988 and was needed as a result of ongoing Federal Appeal by **Kretchmar.**

On 2/1/02 at 1000 hrs., this investigator obtained the tape from Bensalem Twp. Evidence Custodian **William Thompson.** Two copies of the tape were made and the original was returned to the Bensalem Twp. Police Dept.

Case Status: Closed

Report by: Det. Thomas Thiel

1/31/02 _____ 2/1/02SPC
DATE OF INV. DATE DICTATED DATE OF TRANSCRIPTION

_____ 0226027Kretchmar020102.doc
SIGNATURE REVIEWED BY FILE NAME

This document is the property of the Bucks County Detectives and is loaned to your agency; it and its contents are not to be distributed outside your agency.

COURT OF COMMON PLEAS OF BUCKS COUNTY,
PENNSYLVANIA CRIMINAL ACTION - LAW

COMMONWEALTH OF PENNSYLVAINA

Petitioner,

Court of Common Pleas Of Pennsylvania Bucks County

NO.1190/87

vs.

GARY L. KRETCHMAR

Respondent

Attorney I.D.#81450

ORDER FOR HEARING

AND NOW, to wit, it is on. This 15TH day of February 2002, upon consideration of the within petition, a rule is hereby entered upon respondents to show cause, if any, why the prayers of the within petition should not be granted.

A hearing is fixed for the 7th day of March 2002, at 9 a.m., in Courtroom No.1 , in the Court of Common Pleas of Bucks County, at the Courthouse in Doylestown, Pennsylvania.

/s/ Kenneth G. Biehn

J. KENNETH G. BIEHN

COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA CRIMINAL ACTION - LAW

COMMONWEALTH OF PENNSYLVANIA
BUCKS COUNTY
PETITIONER,

COURT OF COMMON PLEAS OF PENNSYLVANIA

Vs.

TERM:
NO. 1190/87

GARY L. KRETCHMAR,
Respondents

Attorney I.D. # 81450

AFFIDAVIT IN SUPPORT OF PETITION TO ACCESS EVIDENCE

I, David A. Avedissian, Esq., do hereby swear and affirm as follows:

1. I am an attorney at law of the Commonwealth of Pennsylvania and am the attorney for Gary L. Kretchmar, defendant with respect to the above captioned action. In this capacity, I am familiar with the facts and circumstances herein.

2. On November 22, 1988, following a jury trial, petitioner was convicted of the 1981 slaying of Scott Rosenblum. Defendant was also found guilty of burglary with respect to the underlying incident.

3. Defendant has exhausted all of his direct appeals and is in the process of petitioning in federal courts under the Federal Habeas Corpus Act.

4. The case was tried before the Honorable Isaac Gaarb and the Commonwealth's case was presented by Assistant District Attorney Larry [illegible]erba.

5. In affirming defendant's conviction, all of the courts have stressed the importance of a recorded statement which defendant gave to the San Diego Police which apparently establishes his guilt.

6. At the trial, Detective Tyron of the San Diego Police Department, provided testimony about a taped statement obtained from defendant prior to trial. The detective testified that defendant stated that "when he first saw the body he saw that the victim had been shot in the head." This evidence was especially damming because the wound was not discovered until the victim's autopsy was conducted. The inference was that defendant knew that there was a wound in the victim's head because he had inflicted same.

7. This testimony and evidence was emphasized by all courts considering the appeals of this case.

8. None of defendant's prior attorneys ever requested a copy of the tape recorded statement to actually hear what defendant said. Defendant specifically denies that he stated he saw the gun shot wound; rather he was aware that the victim had been shot in the head as result of newspaper articles which had reported same.

9. Quite frankly, had the tape been reviewed and had defendant's statement disproved that he claimed to have seen the wound to the victim's head, then a major aspect of the Commonwealth's case would have been rebutted.

10. Based on the limited evidence presented in this case, the result of the trial would likely have been different in the event that the tape had actually been reviewed.

11. This application is made on behalf of defendant for access to review the Commonwealth's evidence from the trial of this case. Defendant is interested in reviewing the evidence for the limited purpose of replaying the tape recorded statement taken by San Diego Police Department. In the event that defendant did not claim to have **seen** the wound, then the issue can be raised in defendant's Federal Habeas Corpus Petition.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing are willfully false. I am subject to punishment.

/s/ DAVID A. AVEDISSIAN
David A. Avedissian, Esq

Sworn and subscribed to
before me this 18th day
of January, 2002.
/s/ SYLVIA J. CALDERON

SYLVIA J. CALDERON
A NOTARY PUBLIC OF NEW JERSEY
MY Commission Expires Oct. 3, 2006

COURT OF COMMON PLEAS OF BUCKS COUNTY,
PENNSYLVANIA CRIMINAL ACTION - LAW

GARY L. KRETCHMAR

Petitioner,

vs.

DONALD T. VAUGHN, et al.

Respondents

COURT OF COMMON PLEAS OF PENNSYLVANIA BUCKS COUNTY

NO. 1190/87

Attorney I.D. # 81450

CERTIFICATE OF SERVICE

David A. Avedissian, Esquire, attorney for Gary L. Kretchmar, certifies that a copy of the foregoing document was served upon Diane Gibbons, Esq., District Attorney of Bucks County and in the manner indicated below, which service satisfies the requirements of Pa. R.C.P 121:

Service by First-Class Mail as follows: Diane Gibbons, Esq.
Bucks Count District Attorney's
Office 55 East Court Street
Doylestown, PA 18901

/s/ DAVID A. AVEDISSIAN
David A. Avedissian

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA
VS.

NO. 1190/87

GARY KRETCHHAR

OPINION AND ORDER

In November of 1988, the defendant was convicted in a trial by jury of murder in the first degree and burglary. He was. thereafter sentenced to life imprisonment. Post verdict motions were filed and denied, and an appeal there from taken to the Superior Court. By Memorandum Opinion, the Superior Court affirmed the judgment of sentence on May 8, 1990.

Defendant has filed a petition pursuant to the provisions of the Post Conviction Relief Act. The Act of April 13, 1988, P. L. 336, No. 47, 42 Pa. . S. A. 9541 et. seq. Counsel was appointed to represent the defendant on this petition, and a hearing has been held. We deny the petition for relief.

Defendant raises four separate issues, each in Conjunction with an assertion of ineffectiveness of counsel. will note in passing that defendant raised a number of issues based upon an alleged ineffectiveness of counsel at the time of his appeal to the Superior Court. Those matters were addressed and dismissed by the Superior Court in its Memorandum Opinion and Order. Therefore, it may be contended that these issues involving ineffectiveness of counsel, which concededly are different from those previously raised, are, notwithstanding, barred by previous litigation and waived pursuant to Section 9544 of the Act.

In any event, we will address the merits of these issues.

The standard for evaluating claims of ineffectiveness of counsel has been stated frequently. The threshold inquiry in such claims is whether the issue, argument, or tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit because counsel cannot be considered ineffective for failing to assert a merit less claim. Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183 (1985). If this threshold is met, it must next be established that the particular course chosen by counsel had no reasonable basis designed to effectuate his client's interests. Commonwealth ex. rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). Finally, we must require that the defendant establish how counsel's commission or omission prejudiced him. Commonwealth v. Pierce 515 Pa. 153, 527 A.2d 973 (1987).

Under the Post Conviction Relief Act, a petitioner must not only establish ineffective assistance of counsel, but must also establish that the ineffectiveness was of a type which in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place. Commonwealth v. Thomas, 396 Pa. Super. 92 578 A.2d 422 (1990). See also, Commonwealth v. Fluharty, 429 Pa. Super. 213, 632 A.2d 312 (1993).

The facts of this case are set forth at length in our opinion on post verdict motions, Commonwealth v. Gary Kretchmar, 55 Bucks Co. L. Rep. 206 (1989) as well as the memorandum opinion of the Superior Court. They need not be restated herein. Suffice it to say, the victim, Scott Rosenblum, was found dead lying face down in the living room of his apartment at 273 Salem Harbour Apartments, Bensalem Township, on October 6, 1981. The body was found when the defendant and Dennis Lapkiewicz, the

victim's brother in law, entered the apartment together at approximately 2:00 p.m. on that date. The police arrived on the scene at approximately 2:30 p.m. No arrests were made nor were any criminal complaints file until January, 1987. At that time, a complaint was filed charging the defendant with this homicide as a result of the delibration of the Bucks County investigating Grand Jury which filed a presentment on January 8 1987 defendant was ultimately arrested in San Diego California, returned to Pennsylvania, and the trial held in November of 1988.

Defendant contends that counsel was ineffective for failure to secure and offer evidence establishing that the records of the Bureau of Alcohol, Tobacco and Firearms (ATF) of the United States Department of Treasury indicated that the defendant sold his .22 caliber rifle prior to the time of the homicide. Some background is necessary in order to understand this contention. It was known that the defendant owned a .22 caliber rifle prior to this homicide. It was also known that the victim owned a .22 caliber rifle with a scope which he kept under his bed fully loaded for his own protection. It was further known that the defendant lived next door to the victim in the apartment complex and had a key to the victim's apartment. The defendant and the victim had been long-standing friends. It was further established that the victim lived alone in his apartment.

As previously noted, the victim was found dead on October 6, 1981 face down on the floor of his living room by the defendant and Lapkiewicz. There was no evidence of forced entry. The evidence established that the victim had been shot three times by a .22 caliber weapon. The victim's weapon was not found. However, a box of .22 caliber ammunition was found in the apartment, three shell casings were found and the three slugs were taken from the victim's body at the time of the autopsy.

At some time after the homicide, there was evidence that the defendant gave a .22 caliber rifle with a scope to Marc Driadon and asked him to sell it. Shortly thereafter, Driadon returned the rifle to the defendant and it was never seen again. It is defendant's contention that counsel should have submitted evidence to show that the defendant had sold his .22 caliber rifle prior to the homicide.

At the hearing on this petition, defense counsel testified that he did not wish to prove that the gun had been sold because he felt that it was in the defendant's interest to have the jury believe that there were two rather than one rifle. We believe that that was a rather astute strategy. The evidence revealed that the slugs taken from the victim's body as well as the shell casings found in the apartment and the box of .22caliber ammunition were all of similar manufacture. Therefore, it required no stretch of imagination to believe that the death dealing weapon was the victim's own rifle. Furthermore, the testimony of Driadon that the .22 caliber rifle which the defendant asked him to sell had a scope. If the jury believed that the defendant still owned his own weapon at the time of the murder, then it might seem logical that he would use that weapon, with which he was more familiar, to kill his victim rather than enter Rosenblum's apartment, hope to find the weapon and then hope to be able to use it successfully. Following that line of reasoning, once it was established that Rosenblum was probably killed by his own weapon, there could be at least some doubt planted in the minds of the jurors as to whether the defendant was the perpetrator. In view of the fact that Rosenblum's weapon was missing, the jury might be led to believe that it was some third person who perpetrated this killing. Furthermore, the jury had heard that the defendant attempted to sell a .22 caliber rifle after this killing.

The evidence regarding the sale of one or both of the rifles is somewhat confused on this record.

Driadon testified that the defendant gave him a .22 caliber rifle with a scope and requested that he sell it sometime after the date of the murder. Other times in his testimony, he seemed to suggest that perhaps that occurrence was before the date of the murder. Furthermore, it has now developed, that there was evidence that there were records of ATF to the effect that the defendant's weapon was, in fact, sold prior to the murder. However, the defendant was unable to give counsel any particulars regarding that weapon as counsel attempted to prepare for this trial. Furthermore, the ATF records regarding this sale came to the attention of PCRA counsel only after the conviction. These records, apparently, were not available to trial counsel prior to the trial. Furthermore, regardless of the confusion in Driadon's testimony as to the time when the defendant gave him the rifle to sell, logically, that could not have occurred prior to the murder. It was his testimony that the rifle which he received from the defendant was a .22 caliber rifle with a scope. Obviously, that had to be Rosenblum's rifle and the defendant would not be in a position to attempt to sell that prior the murder. Furthermore, the rifle given to Driadon for sale would not have been the defendant's because the ATF records, which were ultimately secured, reflected that the defendant's rifle was sold prior to the murder. Therefore, the rifle which the defendant gave to Driadon had to be Rosenblum's rifle, and that evidence would establish that the defendant had possession of it after the murder, it not having been found in Rosenblum's apartment at the time that his body was found.

The alleged shortcoming in counsel's representation in this regard was his failure to submit the evidence of ATF showing the sale of the defendant's rifle prior to the murder. Proving that the defendant sold his gun before the murder would not help him. The evidence substantially pointed to the fact that Rosenblum was shot with his own gun.

Defendant would know that Rosenblum owned a gun and kept it under his bed. Defendant had a key to Rosenblum's apartment. There was no evidence of forced entry. Therefore, even if defendant sold his gun before the murder, he would be the person most likely to have entered Rosenblum's apartment and found Rosenblum's loaded rifle. Either way, defendant had nothing to gain by proving that he sold his rifle before the murder.

In view of the foregoing, we believe that the strategy of counsel in this regard had a reasonable basis and does not constitute ineffectiveness. Essentially, not admitting the evidence of the ATF did the defendant no harm.. See, Commonwealth v. Pierce, supra.

The second issue raised by the defendant is that counsel was ineffective for failure to present evidence of newspaper accounts of this homicide which stated that the victim was shot in the head. The evidence revealed that when the body was found, it was lying face down in the living room of his apartment with a wound to the head not visible because the entrance wound was toward the floor, and the bullet did not exit the body. Therefore, as one viewed the body without disturbing its original position, one would not know that there had been a wound to the head. At the hearing on this petition, three newspapers were presented showing that there were newspaper accounts to the effect that the victim had been shot in the head. When the defendant was arrested in San Diego, in the course of the-examination by the San Diego police, he made reference to the wound to the head. It should be remembered that the defendant discovered the body with Lapkiewicz and therefore viewed it in the position in which it was when the police arrived without the wound to the head visible. Neither defendant nor Lapkiewicz disturbed the body. Based upon this, the Commonwealth argued to the jury that the defendant

could only have known of the wound to the head if he was the perpetrator. The defendant asserts that counsel was ineffective for not submitting evidence of these newspaper accounts to explain how the defendant would have known of it.

The foregoing would have some appeal if that were the essence of what the defendant told the San Diego police. However, the record reveals the following testimony from Tryon, the San Diego Police Detective:

Q. At that time, did he tell you how he came to the apartment and found the body?

A. Yes, he did.
Q. Would you tell the jury what that was, please.
A. He stated that he lived next door, and he received a phone call who he believed was from the victim's sister in law asking him if the victim was at home and he told her he wasn't. She asked him to go over and see if his car was in the garage, he told her the car wasn't there.

She asked him to go into the house to look for the victim and he stated that he would not go in the house by himself. He had a key to get in the house but wasn't going in there by himself. He believes the brother in law may have been called over and together they went in and found the body.

Q. Was he able to remember the brother in law's name?
A. He was never able to provide the name of the person.
Q. Did you take a statement with respect to the body?
A. <u>When he first saw the body he said the body had been shot in the head.</u>

Trial Transcript, N. T. p. 218.

The statement that he gave was that "when he first saw the body ... the body had been shot in the head." He did not tell Detective Tryon that Rosenblum had been shot in the head as a factual assertion. That knowledge could be attributable to information he received from the newspaper articles. When Detective Tryon was asked if the defendant made a statement with respect to the body, he stated that when he first saw the body, it has been shot in the head. His statement was not one of a general fact, but rather, a statement of what he had observed when he first saw the body. Obviously, the genesis of that statement could not possibly have been newspaper articles.

Furthermore, the following appears from Detective Tryon's testimony:

> Q. Did you ever ask Mr. Kretchmar how he knew that he was wanted for homicide? A. Yes I did.
> Q. What was his response?
> A. He stated that he did talk with a family member, he couldn't remember who, but he heard it was in the newspaper and that he was wanted.

Trial transcripts, N. T. p. 218-219.

Therefore, he stated that he had some knowledge that he was wanted because he had spoken with a family member and that he had heard that it was in the newspaper but did not state that he had himself read anything about it in the newspaper.

When questioned at the PCRA hearing as to why he did not present the newspaper articles, counsel testified that when he confronted the defendant with the statements he had given in San Diego, the defendant denied having made those statements.

Obviously, if he did not make those statements, there would be no purpose to be served by introducing the newspaper articles. In any event, in view of the statement which he actually gave to the' detective in San Diego, the newspaper articles were irrelevant and counsel was not ineffective for failing to submit them.

The third issue raised by the defendant was the ineffectiveness of counsel for failure to call a witness from the National Football League (NFL) to testify that Eric Price was not employed by the NFL in October of 1981. Price was clearly the most important Commonwealth witness. He testified that he had been employed as an intern for the NFL and was involved in a Monday night football game between the Philadelphia Eagles and the Atlanta Falcons on the evening of October 5, 1981. He testified that he was a long time friend of the defendant and that he had secured some tickets for the defendant and some friends to attend that football game, and left them at the call in window. It was his testimony that the defendant never called forthose tickets and did not attend the game. He further testified that he received a telephone call from the defendant at approximately 1:00 a.m. on October 6 in which the defendant told him that he had not attended the game but that he had a date with a woman whom he took to the casinos. According to Price, the defendant explained that he was engaged and did not want his fiancee to know that he had had this date with this other woman and asked Price to tell anyone who asked that the defendant was at the football game. Price agreed to do this for his friend.

Price further testified that at approximately 6:00 a.m., he had a second telephone call from the defendant in which the defendant told him that Rosenblum had been murdered, that the body had been found, and that the police were conducting an investigation. It should be noted

that this telephone call was made approximately eight (8) hours before the body was, in fact, discovered by the defendant and Lapkiewicz.

As can be seen the testimony from Price in these respects and others was of great importance to the Commonwealth. There was a statement from a Vice President of the NFL to the effect that Price had been employed by the NFL beginning in the Spring of 1981 and continued in that employment until approximately the end of August, at which time, he was no longer employed. However, this same individual asserted in his affidavit that he was unable to state that Price was not employed or engaged with the NFL in some other capacity after August of 1981. With that in mind, counsel did not call this witness because it clearly was not dispositive of Price's status at the time of this homicide. For that reason alone, we do not believe that counsel was ineffective for failing to submit this evidence.

Secondly, there is other evidence regarding this football game and the Commonwealth's contention that the defendant had the tickets available to him. The record reveals that the defendant had told Detective Scar and one Ricky Silverman that he was, in fact, at the Eagles/Falcon football game. Therefore, regardless of Price's exact status, the defendant had told the police that he was at the football game with Price. Also, it was Price's testimony that he and defendant had agreed to get these tickets in August. Furthermore, in view of the fact that the defendant did not testify, Price really represented the defendant's only opportunity for an alibi defense by either placing him at the football game or at least suggesting that he was at the casino with his date.

It is clear that the purpose of this proffered evidence would be to impeach Price's credibility. The cross examination of Price was quite vigorous in attempting to impeach him albeit without the use of this evidence which we believe would not have been helpful. Obviously, if the only purpose of this evidence was to attack Price's

credibility regarding his status as of the time of the homicide, then that standing alone would be a collateral matter and not admissible for that purpose. Commonwealth v. Bright, 279 Pa. Super. 1, 420 A.2d 714 (1980).

With respect to the credibility of Price, counsel found himself in an impossible position. On the one hand, he wanted to impeach Price's credibility because of the testimony 6:00 a.m. telephone call. On the other hand, he wanted Price's testimony for alibi purposes. It was difficult for counsel to argue impeachment based upon Price's testimony regarding his status with the NFL (whether as a spotter, intern or some informal relationship)
Because defendant had stated to detective Scar and Silverman that he was at the Eagles-Falcons football game that night. Therefore, we find no shortcoming in counsel stewardship regarding this issue.

The last issue raised by the defendant was that counsel's final summation was ineffective. Clearly, it was very brief and to the point. one can thing of a variety of other things which might have been argued. However, we do not find that the argument made by counsel was tantamount to a wavier of argument in its entirety. We do not believe that counsel can be found ineffective because of the quality of the argument in this case.

Upon a close examination of the record of this case, we are satisfied at counsel had a grasp of the issues and diligently pursued the investigation of them. He collected the evidence respecting those issues. In several respects, he had impossible choices to make regarding the utilization of that evidence. If his strategy had worked, and an acquittal had resulted, he would have been a genius. In retrospect, one cannot declare that he was ineffective because of the failure of these strategies which arose because of the several impossible choices he had to make.

Finally, in order complete this application, defendant also asserts the ineffectiveness of appellate counsel for failure to raise theses issues of ineffectiveness of trial counsel on appeal to the Superior Court. In view of our findings herein, we obviously find that appellate counsel was not ineffective because these issues were not of arguable merit.

For the foregoing reasons, this Post Conviction Relief Act application is denied.

ORDER

AND NOW, to wit,' this 15th day of September, 1994, it is hereby ORDERED that the Post Conviction Relief Act application is DENIED, DISMISSED and OVERRULED.

BY THE COURT:

ISAAC S. GARB, J.

Copies to:
Diane Gibbons, Esquire
Senior Deputy District Attorney
Court House
Doylestown, PA 18901

Robert W. Suter, Esquire
First Deputy Public Defender
Court House
Doylestown, PA 18901

Michael S. Goodwin, Esquire
106 West Butler Avenue
New Britain, PA 18901

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA — CASE NO. 1190/87

V.

GARY KRETCHMAR — ATTORNEY I.D. #14703

ANSWER TO REQUEST FOR DISCOVERY

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The Commonwealth, by its attorney, Lawrence M. Cherba, Esquire, Deputy District Attorney, respectfully answers as follows:

1. Reproduced and given to counsel on September 20, 1988.

2. . Reproduced and given to counsel on September 20, 1988.

The Commonwealth is unaware of any police tape in existence.

3. Test conducted by Bucks County Detective Richard Batezel and results were inconclusive.

4. Reproduced and given to counsel on September 20, 1988.

5. Denied. Too broad to answer.

6. Attached.

7. No such surveillance conducted.

8. Supplied on September 20, 1988.

9. Supplied on September 20, 1988.

10. Refused. Too broad to answer.

11. Available for inspection. Please contact District Attorney's Office to arrange date to inspect.

12. No such identification.

13. Refused. Too broad to answer.

14. Refused.

15. Refused.

16. Please contact the District Attorney's Office to make these arrangements.

17. Please contact the District Attorney's Office to make these arrangements.

18. Please contact the District Attorney's Office to make these arrangements.

19. Refused.

20. Refused.

21. Refused.

22. The Commonwealth has been supplying discoverable materials since August 29, 1988, and complying with the continuing duty to disclose as materials come available pursuant to Pa. Rule of Crime. Pro. 305.

23. Supplied on September 20, 1988.

24. Supplied on September 20, 1988.

25. Please contact the District Attorney's Office to make these arrangements.

26. Please contact the District Attorney's office to make these arrangements.

27. Please contact the District Attorney's Office to make these arrangements.

28. Supplied on September 20, 1988.

29. Answered in paragraph #6.

30. Supplied on September 20, 1988.
31. Supplied on September 20, 1988.
32. Supplied on September 20, 1988.
33. Refused. Too broad to answer
34. Supplied on September 20, 1988.
35. Supplied on August 29, 1988 and September 20, 1988.
36. No agreements have been made.
37. Yes. Murder of the first degree.
38. See 42 Pa. C. S. 9711(d)(6).
39. All evidence pertaining to paragraph 39 has been supplied.
40. There are no mitigating circumstances that, the Commonwealth is aware.
41. None.

Respectfully submitted,
/s/ LAWRENCE M CHERBA
LAWRENCE M. CHERBA, ESQ.
DEPUTY DISTRICT ATTORNEY

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF

PENNSYLVANIA NO. 1190/87

VS.

GARY KRETCHMAR ATTORNEY ID # 1318

RULE TO SHOW CAUSE

AND NOW, this 21st day of October 1988, upon consideration of the within Motion to Compel Discovery of Gary Kretchmar, by his/her attorney, Robert W. Suter, Esquire, First Deputy Public Defender, a Rule is granted upon Alan M. Rubenstein, Esquire, District Attorney of Bucks County, to show why the Commonwealth should not be ordered to comply with the defendant's request for pre-trial discovery in the above-captioned case. Rule returnable seven(7) days after service hereof.

BY THE COURT:

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF

PENNSYLVANIA NO. 1190/87

VS.

GARY KRETCHMAR ATTORNEY ID #13518

MOTION TO COMPEL DISCOVERY

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Gary Kretchmar, by his/her attorney, Robert W. Suter, Esquire, First Deputy Public Defender, respectfully represents that:

1. The above defendant is charged with first degree murder and burglary.

2. On September 14, 1988, the defendant filed a formal request for discovery.

3. To date the foregoing request has not been answered.

4. The discovery of the requested information is either required or relevant and helpful to the preparation of a defense.

5. Without such discovery, your movement is unable to prepare his defense.

6. The Commonwealth's failure to so answer has prejudiced- your movant's ability to prepare for his/her scheduled trial.

7. The refusal of the Commonwealth to furnish the above information denies the defendant his rights and privileges secured by the Fourteenth Amendment to the United States Constitution, Article I, §9 of the Pennsylvania Constitution, and Pennsylvania Rules of Criminal Procedure 304 and 305.

WHEREFORE, defendant prays this Honorable Court to direct and order the Commonwealth to answer defendant's Respectfully submitted, request for pre- trial discovery.

Respectfully Submitted,
ROBERT W. SUTER
First Deputy
Public Defender

VERIFICATION

I, Robert W. Suter, Esquire, verify that the statements made in the foregoing motion are true and correct to the best of my information, knowledge, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

/s/ ROBERT W SUTER
Robert W. Suter, Esquire
First Deputy Public Defender

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA NO. 1190/87

VS.
GARY KRETCHMAR ATTORNEY ID #13518

REQUEST FOR DISCOVERY

TO THE DISTRICT ATTORNEY:

Pursuant to Pennsylvania Rules of Criminal Procedure 305(a), Gary Kretchmar, by his attorney, Robert W. Suter, Esquire, First Deputy Public Defender, respectfully requests disclosure to the following items, and where applicable, an opportunity to inspect, copy or photograph them:

1. All statements, confessions, conversations, correspondence, and any written or oral communications of the defendant made at any time before or after the death of Scott Rosenblum which the Commonwealth intends to introduce into evidence at any time during the trial of the above-captioned matter, or at any pre-trial or post-trial proceedings.

2. All statements, confessions, conversations, correspondence, and any written or oral communications of the defendant made at any time before or after the death Scott Rosenblum which the Commonwealth has obtained and which the Commonwealth does not intend to offer into the evidence at any stage of the litigation in the above-captioned matter; including, but not limited to, the police tape of the report of the death of Scott Rosenblum.

3. The results of the polygraph examination of the defendant.

4. The names, addresses and occupations of witnesses to such communications as well as any other persons interviewed in connection with any communications covered under paragraphs 1 and 2.

5. Copies of all statements obtained from any persons in connection with any information covered by paragraphs 1, 2 and 4 above.

6. The defendant's prior criminal record, including but not limited to:

a. any and all arrests and convictions as an adult in any state, county, or federal government.

b. all arrests and convictions concerning summary or traffic offenses as an adult or juvenile in any state, county, or federal government.

c. all juvenile arrests and adjudications in any state, county, or federal government.

7. The transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained.

8. The names and addresses of all eye and earwitnesses.

9. The names and addresses and statements, written or oral, including grand jury transcripts, in the possession of the Commonwealth of all witnesses whom the Commonwealth intends to call at trial.

10. The occupations and criminal records of any witnesses whom the Commonwealth intends to call at trial.

11. Any tangible objects, including but not limited to documents, any and all photographs, fingerprints, chemical, biological and fiber traces or samples, blood traces or samples, any and all weapons and ammunition, clothing, any and all tangible objects or documents seized pursuant to search warrants or search without warrant, and other tangible evidence.

12. The circumstances and results of any identification of the defendant and/or his property or effects by voice, photograph, in-person identification, or other procedure.

13. Any information obtained by the Commonwealth that any persons other than the defendant had a motive or inclination to kill or otherwise do violence to the decedent, Scott Rosenblum.

14. Please list the names of all persons whose tape recorded statements were obtained in connection with the prosecution of Commonwealth vs. Gary Kretchmar and/or the investigation of the death of Scott Rosenblum.

15. Please make available for copying all such tape recordings. Please preserve such tape recordings in the present form until final order of the court in this matter and neither erase nor destroy nor otherwise impair the usefulness of such tape.

16. Please supply for copying all photos in the hands of any law enforcement agency in regard to the death of Scott Rosenblum and to the preparation of the prosecution of Commonwealth vs. Gary Kretchmar. In connection with all such photos, please supply the following information: the names of the photographer, the time, place and circumstances under which such photographs and the names of all person who printed such photographs and the names of all persons having custody of such photographs prior to their delivery to the defendant pursuant to this request.

17. Please permit the defendant or his counsel to examine all exhibits the Commonwealth intends to introduce at the trial of the case, including but not limited to property of decedent, property of the defendant, diagrams, models, drawings, maps, aerial photographs, blueprints or any other illustrative evidence.

18. Please designate a time at which defendant or his counsel may examine all physical evidence in the possession of the Commonwealth.

19. The names and employment of all law enforcement personnel, including personnel of the Federal Bureau of Investigation known to the Commonwealth to have been involved in the investigation and preparation of the Commonwealth case in the matter of Commonwealth vs. Gary Kretchmar and all those involved in the investigation of the death of Scott Rosenblum.

20. Pertaining to those persons who come within paragraph 19, please indicate whether the District Attorney is willing to make such persons available for interviewing by defendant's counsel.

21. If any member of the Office of the District Attorney has communicated with the media pertaining to this case, please furnish the date, names of persons and media organizations involved, type of communication (e.g. telephone, in person, press release, etc.), and context.

22. Any evidence favorable to the defendant which is material either to guilt or punishment which has not been elicited by the foregoing requests.

23. The results of any tests performed on any of the tangible evidence on the defendant, the date and time of such test, the circumstances under which these tests were administered, and the name and qualifications of the person performing the test.

24. The results of any and all studies on tests performed on the body of Scott Rosenblum or medical observations of Scott Rosenblum including, but not limited to autopsy reports, hospital reports, pathological reports and toxicological reports, and any other visual or other observations of the body of Scott Rosenblum of which the Commonwealth is aware.

Disclosure of this information is necessary and would be in the interest of justice in that:

(a) it would permit thorough preparation for trial and minimize surprise at trial in a complex case where defense investigation and supportive resources of the defense are limited;

(b) it would provide the accused with sufficient information to promote the possibility of an informed plea consistent with the intent of the Pennsylvania Rules of Criminal Procedure;

(c) it would promote the fairness and orderliness of all proceedings henceforth;

(d) it would not prejudice the Commonwealth except insofar as it would minimize surprise at trial.

25. A detailed list of all property believed to be that of the decedent presently in the possession or control of the Commonwealth.

26. Please indicate when all items sent to any scientific facility or laboratory for investigation and/or analysis will be returned to the Commonwealth and made available for similar testing by experts employed by the defendant.

27. Please indicate when all items sent to any scientific facility or laboratory for investigation and/or analysis which have been returned to the Commonwealth will be made available for similar testing by experts employed by the defendant.

28. All evidence which the Commonwealth intends to introduce at trial regarding flight or concealment of defendant.

29. All evidence of prior crimes or criminal activity of defendant which the Commonwealth intends to introduce at trial.

30. Copies of all news releases, press statements, or similar items which have been released or submitted by the Commonwealth and law enforcement agencies regarding the case of Commonwealth vs. Gary Kretchmar and the death of Scott Rosenblum.

31. Specify and describe all physical and demonstrative evidence and tangible objects in the possession or control or which the Commonwealth is aware including but not limited to:

(a) fingerprints
(b) footprints
(c) weapons
(d) tools and similar instrumentalities
(e) hair and fiber samples (f) blood samples
(g) handwriting exemplars
(h) money, watches, rings, clothing, checks and credit cards
(i) soil and plant samples
(j) maps, diagrams, models, etc.
(k) physical possessions and tangible objects of the defendant.

32. The facts and circumstances regarding the Commonwealth's obtaining and seizing or obtaining custody, possession or control of the subject matter of paragraph 31, including but not limited to: arrests, searches and seizures, with or without a warrant, voluntary relinquishment. Please specify the manner in which any and all blood samples, hair samples, soil samples, and fingerprints were obtained.

33. List the names and addresses of all person(s) in the chain of custody of physical evidence the Commonwealth intends to introduce at trial and specify the chain of custody.

34. Results or reports of scientific tests, expert opinions and written or recorded reports of the subject matter of paragraph 31 which are within the possession or control of the Commonwealth, or which the Commonwealth is aware of, including but not limited to the following:

a. the names, addresses, and occupations of the person(s) who obtained any and all results or arrived at expert opinions.

b. the date, time, and place any tests were performed or expert opinions arrived at.

c. the names, addresses, and occupations of person(s) who performed any tests and arrived at expert opinions.

d. the procedures used in performing any such tests and arriving at expert opinions.

35. All police and detectives reports regarding Commonwealth vs. Gary Kretchmar, and the death of Scott Rosenblum.

36. In instances where a person(s) agrees to provide information or evidence on behalf of the Commonwealth, provide: the names and addresses of such person(s), the terms and conditions of all such agreements, deals, or bargains, including but not limited to: the date, time, and place of such agreement and the person(s) making such agreement on behalf of the Commonwealth.

37. Will the Commonwealth seek the death penalty, and as to which charges?

38. Specify in detail any aggravating circumstances which the Commonwealth intends to rely on at trial of the defendant, if the Commonwealth intends to seek the death penalty.

39. Provide all evidence and information which the Commonwealth has in its possession or control or is aware of which tends to weaken or impeach any listed aggravating circumstances.

40. Provide all evidence and information which the Commonwealth has in its possession or control, or is aware of, regarding mitigating circumstances listed in 42 Pa. C.S.A. §9711(e).

41. Please list any evidence or information favorable to the defendant which relates either to guilt or punishment which has not been heretofore requested, including but not limited to evidence or information which tends to weaken, impeach, or contradict other evidence or information, evidence which makes inculpatory evidence equivocal or casts doubt on other evidence or information which is inculpatory.

42. The evidence or information with respect to paragraph 41, hereby specifically includes but is not limited to:

a. Police and detectives reports.

b. Statements of witnesses or person(s) interviewed by law enforcement personnel.

c. scientific tests and expert opinions.

d. fingerprints and footprints.

e. psychiatric and psychological reports, documents, information and data.

f. information regarding cause of death. Defendant respectfully reserves the right to supplement or add requests for pre-trial discovery based on the Commonwealth's responses to the foregoing requests.

Respectfully submitted,
Robert W. Suter, Esquire
First Deputy Public Defender

(2)

Supreme Court, U.S.
FILED
DEC 14 2004
OFFICE OF THE CLERK

No. 04-650

IN THE

Supreme Court of the United States

GARY L. KRETCHMER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

BRIEF IN OPPOSITION

STEPHEN B. HARRIS*
Chief of Appeals
DIANE E. GIBBONS
District Attorney
BUCKS COUNTY DISTRICT
ATTORNEY'S OFFICE
Bucks County Courthouse,
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(215) 348-6344

* *Counsel of Record*

Attorneys for Respondent

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The Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of Pennsylvania dated August 16, 2004.

COUNTER-STATEMENT OF CASE

A. Procedural History

On November 22, 1988, following trial by jury, Petitioner was convicted of First Degree Murder and Burglary. On May 26, 1989, Petitioner's post-verdict motions were denied, and on June 30, 1989, Petitioner was concurrently sentenced to life imprisonment for First Degree Murder and not less than ten nor more than twenty years for Burglary.

On May 8, 1990, the Pennsylvania Superior Court denied Petitioner's direct appeal. The Pennsylvania Supreme Court denied allocatur on April 30, 1991. Petitioner did not seek a writ of certiorari to the United States Supreme Court.

In October 1993, Petitioner filed his first petition for post-conviction collateral relief. On September 5, 1994, the trial court denied Petitioner's request for relief. The Superior Court denied Petitioner's appeal of the denial of his PCRA on December 29, 1995. On March 27, 1997, the Pennsylvania Supreme Court dismissed the petition for allowance of appeal.

Petitioner's collateral challenges in Federal Court were likewise denied in February 1999 through April 2001.

On January 23, 2002, Petitioner filed a petition with the trial court seeking an Order to compel the Commonwealth

to provide a copy of his audio taped interview by the San Diego Police Department. Prior to any Court action, the Commonwealth forwarded a copy of the audiotape to Petitioner's counsel on February 4, 2002. The Commonwealth previously provided Petitioner with the contents of the audio taped interview during discovery. The hearing subsequently scheduled on Petitioner's motion was dismissed by the trial court because Petitioner's counsel failed to appear and the issue raised by Petitioner was moot.

On April 25, 2002, Petitioner filed his first petition with the trial court allegedly seeking habeas corpus relief, claiming alleged discrepancies between the contents of the aforementioned audiotape and testimony of the San Diego police officer at trial, and implying ineffective assistance of all previous counsel for failure to secure a copy of same audiotape. The trial court, treating the petition as a Post Conviction Relief Act petition, dismissed the petition without a hearing on August 7, 2002.

Petitioner filed a second petition requesting habeas corpus relief on September 12, 2002. In this petition, Petitioner alleged constitutional violations involving discovery violations and/or prosecutorial misconduct concerning the aforesaid audio taped interview. The trial court denied this petition, also treated as a Post Conviction Relief Act petition, on October 1, 2002. The Superior Court denied Petitioner's appeal and Petitioner's application for re-argument on June 5, 2003. The Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal on February 17, 2004. On August 16, 2004, the Pennsylvania Supreme Court also denied Petitioner's Petition for Writ of Habeas Corpus.

The instant *pro se* petition for writ of Certiorari to the United States Supreme Court followed.

B. Factual History

At trial, the evidence established that on October 6, 1981 Scott Rosenblum was found dead in his apartment at Number 273 Salem Harbour Apartments, Bensalem Township, Bucks County, Pennsylvania. Gary Kretchmar, the Petitioner, and the victim's brother in-law discovered the victim lying face down in his living room.

Petitioner and his brother-in-law discovered the body when the victim's estranged wife and sister became concerned after not hearing from the victim. N.T. 11/16/88 at 58. After attempting to contact the victim several times without success, the victim's wife and sister called Petitioner and asked him to investigate. N.T. 11/16/88 at 58-59. At that time, Petitioner was the victim's neighbor and had a key to his apartment. N.T. 11/16/88 at 59, 61. However, Petitioner refused to check on the victim. N.T. 11/16/88 at 57-61. Eventually, the victim's brother-in-law approached Petitioner and requested access to the victim's apartment. N.T. 11/16/88 at 70-73. Petitioner conceded, and at approximately 1:30 to 2:00 p.m., both entered the victim's apartment, where they discovered the victim's body lying face down in the living room. N.T. 11/16/88 at 70-74. When police later arrived at 2:30 p.m., they did not discover any signs of forced entry. N.T. 11/16/88 at 51.

On October 6, 1981 at approximately 1:00 to 1:30 a.m., Gertrude Kalinowski, the victim's neighbor, heard the outside door to the corridor leading to the rear entrance of both her and the victim's apartments open and quickly shut. N.T. 11/17/88 at 152-54. Kalinowski also heard someone running and three gunshots. N.T. 11/17/88 at 152-54.

An autopsy revealed that the victim had been shot three times. The victim was first shot in his back; the bullet hit the spinal cord and lodged in the lung. N.T. 11/16/88 at 133-34. The second shot went into the victim's chest, where the bullet broke the sternum and a rib, and pierced the heart. N.T. 11/17/88 at 133. The final shot, which was not visible on scene due to the position of the victim's head, entered the victim's left ear and entered the brain. N.T. 11/16/88 at 134. All three bullets remained lodged in the victim's body and were recovered during the autopsy. N.T. 11/16/88 at 133-34. According to the pathologist, any one of the shots could have caused the victim's death. N.T. 11/17/88 at 137.

When questioned about his whereabouts on October 5, 1981, Petitioner told police he attended a Philadelphia Eagles football game with Eric Price, a long-time friend. N.T. 11/16/88 at 52-53. Originally, Price corroborated this story at Petitioner's request. N.T. 11/16/88 at 94. However, when interviewed subsequently, Price admitted that Petitioner never attended the game. N.T. 11/16/88 at 85. Price did attend the game, and at approximately 2:00 a.m. returned home, where he received a phone call from Petitioner. N.T. 11/16/88 at 88. Petitioner apologized for not attending the game and at the end of the conversation, twelve hours before the victim's body was discovered, told Price that someone had been murdered and he would explain everything in detail later. N.T. 11/16/88 at 87-90. At approximately 6:00 a.m. that same morning, Petitioner told Price by telephone that the victim had been killed. N.T. 11/16/88 at 90-91. He further claimed the police had retrieved the body and were questioning witnesses about the murder, which they believed was committed by organized crime. N.T. 11/16/88 at 90-91. At approximately 1:30 to 2:00 p.m., Petitioner again contacted Price. N.T. 11/16/88 at 91. Petitioner stated he told

police he was with Price the previous night, and asked Price to corroborate this alibi. N.T. 11/16/88 at 91-92.

Police officers conducted a search of the victim's apartment and uncovered a full box of .22 caliber bullets. N.T. 11/16/88 at 43; 11/17/88 at 253-54. However, police did not locate the victim's .22 caliber bolt-action rifle and scope, which he kept underneath his bed. N.T. 11/16/88 at 253-54. Additionally, police were unable to locate the victim's briefcase, which contained cash proceeds from the victim's business. N.T. 11/21/88 at 188-92, 253-54.

The Federal Bureau of Investigation's laboratory in Washington D.C. analyzed the bullets extracted from the victim's body, three empty casings, and the box of bullets found at the scene. N.T. 11/21/88 at 21-25. The casings and projectiles were fired from the same .22 caliber weapon. N.T. 11/21/88 at 17-25. Furthermore, the projectiles were produced by the same manufacturer and in the same general batch as the live rounds found in the box at the scene. N.T. 11/21/88 at 17-25.

Following the issuing of the Grand Jury Presentment and the filing of the Criminal Complaint, the Commonwealth discovered that Petitioner fled the area. Petitioner was not apprehended until July 1988, in San Diego, California. When interviewed by the San Diego Police Department regarding the murder, Petitioner claimed he did not know the victim's last name and discovered the body with the victim's brother-in-law. Robert Tyrone, a detective with the San Diego Police Department, testified that Petitioner told him that when he first saw the body, the victim appeared to be shot in the head. N.T. 11/17/88 at 216-18.

REASONS FOR DENYING THE PETITION

A. The Pennsylvania Supreme Court Properly Dismissed Petitioner's Writ Of Habeas Corpus As Time-Barred And Waived, Pursuant To The Post Conviction Relief Act, 42 Pa. C.S.A. § 9501, *et seq.*

Petitioner claims in his petition for writ of habeas corpus before this Honorable Court that the Commonwealth committed a discovery violation by "withholding" the taped interview of Petitioner by the San Diego Police Department conducted in July of 1988. This claim, implicating discovery and/or constitutional violations, and therefore the truth-determining process at trial, is subsumed within the Post Conviction Relief Act, 42 Pa. C.S.A. § 9501, *et seq.* (PCRA), time-barred, and has been waived. Moreover, Petitioner's claim is unsupported by the record and without merit. Therefore, the Pennsylvania Supreme Court properly denied Petitioner's writ of habeas corpus.

Allegations of prosecutorial misconduct are properly asserted on direct appeal; if a defendant fails to allege prosecutorial misconduct on direct appeal, then those claims are waived. However, "any meritorious claims which escape counsel's recognition on direct appeal can then be raised on grounds of counsel's ineffectiveness" in a PCRA petition. *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (1998). The PCRA is "the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies . . . including habeas corpus and corum nobis." 42 Pa. C.S.A. § 9542.

A petitioner must file a PCRA petition within one year from the date his judgment becomes final. 42 Pa. C.S.A.

§ 9545(b)(1). "A judgment of sentence becomes final once an appellant's means of direct review of a conviction, including discretionary review in the Supreme Court of the United States or the Supreme Court of Pennsylvania, have concluded or the time limits for seeking a direct appeal have expired." *Commonwealth v. Tedford*, 781 A.2d 1167, 1170-71 (Pa. 2001). The only exceptions to the one-year filing requirement involve "government interference, after-discovered facts or evidence and an-after recognized constitutional right." *Commonwealth v. Johnson*, 841 A.2d 136, 139 (Pa. Super. 2003) (citing 42 Pa. C.S.A. § 9545(b)(1)(i)(ii)(iii)). To qualify for any of these exceptions, a petitioner must "not only satisfy the substantive requirements of the savings provision, but must also file a petition invoking such exception within 60 days of the date the claim could have been filed." *Commonwealth v. Fahy*, 737 A.2d 214, 220 (Pa. 1999). The after-discovered evidence exception requires a petitioner to show that the evidence:

> (1) has been discovered after the trial and could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative, (3) will not be used solely for impeachment purposes; and (4) is of such a nature and character that a different verdict will likely result if a new trial is granted.

Commonwealth v. Henry, 706 A.2d 313, 321 (Pa. 1997).

In contrast, habeas corpus is an extraordinary remedy that "may only be invoked when other remedies in the ordinary course have been exhausted or are not available." *Commonwealth v. DiVentura*, 734 A.2d 397, 398 (Pa. Super. 1999).

> If a petitioner is in custody by virtue of a judgment of sentence of a court of competent jurisdiction, the writ generally will not lie. Pennsylvania law explicitly states that in cases where a person has been restrained by virtue of sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post conviction hearing proceedings authorized by law. *Issues are not cognizable under the statutory remedy of habeas corpus if they could have been considered and corrected in the regular course of appellate review or by post-conviction proceedings authorized by law.*

Id.

Therefore, the writ of habeas corpus continues to exist as an independent basis for relief only in cases in which there is no remedy under the PCRA. *Fahy*, 737 A.2d at 214.

Petitioner's claims of violations of the constitution and of the law in his petitions for habeas corpus relief, and the alleged implication of the truth-determining process, if pled and proven by a preponderance of the evidence, are claims that would be cognizable under the PCRA. *See* 42 Pa. C.S.A. § 9543(a)(2)(i). Petitioner previously raised these issues in two petitions that were dismissed due to un-timeliness pursuant to the jurisdictional requirements of the PCRA. 42 Pa. C.S.A. § 9545(b); *see also Commonwealth v. Breakiron*, 781 A.2d 94 (2001); *Commonwealth v. Baldwin*, 789 A.2d 728 (2001); *Commonwealth v. Lark*, 746 A.2d 585 (2000); *Fahy*, 737 A.2d 214; *Commonwealth v. Peterkin*, 722 A.2d 638 (1998); *Commonwealth v. Kutnyak*, 781 A.2d 1259 (2001); *Commonwealth v. Alcorn*, 703 A.2d 1054 (1997), *allocatur*

denied. Petitioner's judgment of sentence became final on July 29, 1991, upon the expiration of the ninety day period for seeking review to the U.S. Supreme Court of the Pennsylvania Supreme Court's April 30, 1991 Order denying allocatur. *See Fahy*, 737 A.2d at 218. Since the date of final judgment was July 29, 1991, and this petition was filed eleven years later, it is obviously beyond the PCRA'S one-year time limitation. *See id.*. Moreover, Petitioner's counsel conceded in his petition for writ of habeas corpus filed in the trial court on April 25, 2002 that "[Petitioner] is jurisdictionally out of time for filing under the Post Conviction Relief Act." Petition for Writ of Habeas Corpus, CV NO. 0202731-276, Paragraph 14.

Furthermore, the untimely filing of Petitioner's petition does not fall within the statutory exceptions found in 42 Pa. C.S.A. § 9542(b). Petitioner attempts to claim that the audio tape in question is after discovered evidence. However, Petitioner has not claimed and cannot claim that the facts and averments underlying his claims were unknown to him and could not have been ascertained through the exercise of reasonable diligence. 42 Pa. C.S.A. § 9545(b)(1)(ii). The existence of the taped interview was provided to Petitioner prior to trial in the discoverable materials. *See* Discoverable Materials, Additional Discovery dated September 20, 1988: Report of Detective Kenneth Hopkins, Bensalem Township Police Department, dated July 22, 1988; Report of V. Colvin, San Diego Police Department, dated July 14, 1988; Report of R. Tryon, San Diego Police Department, dated July 15, 1988. In addition, Petitioner was obviously present during that taped interview; therefore, he was aware of the tape's existence, as well as the statements he made to the San Diego Police. The audiotape simply corroborated the testimony of Detective Tyron. At trial, Detective Tyron testified the Petitioner stated that when he first saw the

body, it appeared the victim was shot in head. N.T. 11/17/88 at 218. The verbatim, taped conversation was:

> Detective Tyron: "What did it appear [the victim] died of?"
>
> Petitioner: "Shot in the head."

The evidentiary relevance of Detective Tyron's testimony regarding Petitioner's statement to him and Petitioner's actual words in the taped interview, taken in context, are the same. Petitioner could not have known that the victim was shot in the head based on his discovery of the body, due to the position of the body at the crime scene. Playing the tape at trial would not have resulted in a different verdict. Therefore, the after discovered evidence exception to the PCRA's one-year filing requirement does not apply.

Moreover, under the PCRA, a claim is waived if Petitioner could have raised it before trial, at trial, on direct appeal, or in a prior state post-conviction proceeding, but failed to do so. 42 Pa. C.S.A. § 9544(b). Petitioner, who was obviously present at the taped interview, and therefore aware of the tape's existence and the statements he made during the interview, waited over thirteen years to allege a discovery violation and contest Detective Tryon's testimony. Petitioner's failure to raise the instant claims regarding the taped interview pre-trial, at trial, on direct appeal, or in his first PCRA challenge constitutes a waiver of these claims.

The fact that Petitioner's claims, which may have been cognizable under the PCRA, are precluded by the PCRA's timeliness requirements and waived does not entitle Petitioner to habeas corpus relief. *Commonwealth v. Johnson*,

732 A.2d 639 (1999). "Simply because a petition is not considered because of previous litigation or waiver does not alter the PCRA's coverage of such claims or make habeas corpus an alternative basis for relief." *Fahy*, 737 A.2d at 224.

In addition, Petitioner's claim that the Commonwealth committed a discovery violation by "withholding" the taped interview of Petitioner by the San Diego Police has no merit. There is no evidence of record that any information was withheld. Petitioner's self-serving claim that he could have learned that the victim was shot in the head through newspaper accounts is wholly unsupported by the record. Nowhere in the taped interview does Petitioner ever say that he read in the newspapers that the victim was shot in the head. No evidence was introduced at trial that Petitioner learned that the victim was shot in the head through newspaper accounts, nor did trial counsel have any evidence suggesting the same. In fact, Petitioner denied to trial counsel that he even made such a statement. N.T. 6/24/94 at 38.

Petitioner further alleges that if his constitutional claim is time-barred under the PCRA, then he is still entitled to relief under the fundamental miscarriage of justice exception articulated in *Schlup v. Delo*, 513 U.S. 298 (1195). In *Schlup*, the Petitioner filed a federal habeas corpus petition claiming he was actually innocent. 513 U.S. at 307. Petitioner's constitutional claim of innocence was procedural, based on his contention that counsel was ineffective and the prosecution withheld evidence. 513 U.S. at 314. The fundamental miscarriage of justice exception is "[t]he doctrine allowing a federal court in a habeas corpus proceeding to address a claim of constitutional error that, although ordinarily unreviewable, is subject to review because of a state-court procedural default that rendered the

proceedings basically unfair." Black's Law Dictionary 683 (8th ed. 2004). Under the fundamental miscarriage of justice exception, if a petitioner makes a proper showing of actual innocence, then his time-barred constitutional claim may be considered on the merits. *See Herrera v. Colllins*, 506 U.S. 390, 404 (1993). However, the application of this exception should only occur in the "extraordinary case . . . to those who [are] truly deserving." *Schlup*, 513 U.S. at 321. In *Schlup*, this Honorable Court stated that "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." 513 U.S. at 321. To maintain such a claim, a petitioner must support his allegations of constitutional error with new, reliable evidence that was not presented at trial. 513 U.S. at 324.

First, it is important to note that in *Schlup*, the petitioner filed a federal writ of habeas corpus. Petitioner's case can be distinguished from *Schlup* because Petitioner filed a state writ of habeas corpus. However, even if the principles of *Schlup* and fundamental miscarriage of justice exception are applied to the present case, Petitioner is still not entitled to relief. Here, the after-discovered evidence is an audiotape of an interview with the Petitioner. Petitioner was obviously present during that taped interview; therefore, he was aware of the tape's existence, as well as the statements he made to the San Diego Police. The Commonwealth turned over the contents of the tape to Petitioner during discovery, prior to trial. Furthermore, the tape itself does not provide any new evidence. Moreover, unlike in *Schlup*, the record contains evidence, other than Detective Tyron's testimony, which establishes Petitioner's guilt. Therefore, Petitioner has failed to advance a substantial claim of actual innocence and does not qualify for relief under the fundamental miscarriage of justice exception enunciated in *Schlup*.

Finally, Petitioner contends that "it is impossible to find a state avenue to process a constitutional violation claim during collateral review of a criminal conviction." Petition for Writ of Certiorari at 21. During collateral review, constitutional violations are properly addressed through the PCRA. 42 Pa. C.S.A. § 9543(a)(2)(i). Specifically, the PCRA provides that a petitioner may be eligible for relief if he pleads and proves by a preponderance of the evidence "a violation of the Constitution of this Commonwealth or the Constitution or laws of the United States, which so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. § 9543(a)(2)(i). Petitioner cannot obtain relief because his petition was waived and not timely, not because state avenues do not exist to process constitutional claims during collateral review.

Therefore, Petitioner is not entitled to relief.

CONCLUSION

Wherefore, for the aforementioned reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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